CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 519

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, PETITIONER,

vs.

JAMES D. COUGHRAN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 20, 1937.

CERTIORARI GRANTED DECEMBER 6, 1937.

SUPREME COURT OF THE UNITED STATES

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[fol. 3]

IN SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 382898

JAMES D. COUGHRAN, Plaintiff,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a Corporation, JOHN DOE COMPANY ONE TO THREE, Defendants

COMPLAINT ON CONTRACT—Filed January 25, 1935

Comes Now the plaintiff and complaining of the defendants, and each of them, for cause of action alleges:

I

That the defendant, State Farm Mutual Automobile Insurance Company, a corporation, is a corporation authorized and licensed by the laws of the state of California to conduct therein a general automobile insurance business; that at all times herein referred to, the said defendant has been so authorized and licensed and has conducted and is conducting such automobile insurance business in the state of California, at all times maintaining in the city and county of Los Angeles an office for said purpose;

That the other defendants, John Doe Company One to Three, are sued herein under fictitious names for the reason [fol. 4] that the plaintiff does not know their true names, but when said true names are ascertained by plaintiff, he will ask leave of court to substitute said true names for the fictitious names herein used.

II

That within one year preceding June 16th, 1934, the defendant, State Farm Mutual Automobile Insurance Com-

pany, a corporation, for a money consideration to it paid, made, executed, and delivered in the county of Los Angeles, State of California, to one R. O. Anthony its written contract of insurance by the terms of which the said defendant, State Farm Mutual Automobile Insurance Company, undertook and agreed to insure, protect and indemnify the said R. O. Anthony against any and all legal liability arising from injury and/or damage caused to the person or property of any other person through the ownership, maintenance or operation of a certain Chevrolet automobile, which at all times herein referred to was owned by the said R. O. Anthony; that the period covered by the terms of said contract was one year, including June 16th, 1934, and that on said day, the said contract of insurance was in full force and effect; that by the terms of said contract of insurance, the said defendant, State Farm Mutual Automobile Insurance Company, a corporation undertook and agreed to insure, protect and indemnify any other person as additional assured against any and all legal liability imposed upon such other person through injury or damage to the person or property of another through the operation of said Chevrolet automobile by such other person as additional assured while operating said automobile with the consent, expressed [fol. 5] or implied, of the said R. O. Anthony; that by the terms of said contract of insurance, the said defendant, State Farm Mutual Automobile Insurance Company, undertook and agreed to insure, protect and indemnify such person as above set forth in the sum and in excess of Five Thousand Ninety-two Dollars and Fifty five Cents ($5,092.55).

III

That by the terms of said contract of insurance, it was provided that in the event any person should recover a judgment for personal injuries or property damage through the negligent operation of said Chevrolet automobile by R. O. Anthony or any other person operating the same with his permission, express or implied, against the said R. O. Anthony or such other person, then such injured person, as judgment creditor, may bring suit directly against the defendant, State Farm Mutual Automobile Insurance Company, as insurance carrier to recover on said judgment and may recover payment of said judgment directly from the said defendant, State Farm Mutual Automobile Insurance Company.

IV

That on or about the 16th day of June, 1934, one Helen B. Anthony operated said Chevrolet automobile with the permission, express or implied, of the said R. O. Anthony and operated the same negligently so as proximately to cause an accident and injury and damage to the person and property of the plaintiff to his damage in the reasonable sum of $5,092.55.

[fol. 6]

V

That thereafter, plaintiff commenced an action in the above court against the said R. O. Anthony as owner of said automobile, and against the said Helen B. Anthony as the operator thereof, to recover damages for the personal injuries and property damage proximately caused from said accident and negligence; that the defendant, State Farm Mutual Automobile Insurance Company, according to the terms of the said contract of insurance, managed and conducted the defense of said action and caused its attorneys to represent the said R. O. Anthony and Helen B. Anthony during the trial thereof; that said defense of said action was conducted by said defendant under the terms of the said contract of insurance.

VI

That thereafter, on or about the 30th day of October, 1934, plaintiff recovered a judgment in said action in the above court against the said R. O. Anthony and Helen B. Anthony, and each of them, for said injuries and damage in the sum of $5,092.55; that no appeal has been taken from said judgment and it is now final; that plaintiff is the owner of said judgment.

VII

That plaintiff has made demand on the defendant, State Farm Mutual Automobile Insurance Company, for payment of said judgment but that said defendant has refused, and still refuses, to pay the same, or any part thereof; that the said judgment has not been paid, nor any part thereof, and the same is now wholly unpaid; that plaintiff is in-

[fol. 7]

formed and believes, and, upon such information and belief, alleges that the said R. O. Anthony and Helen B. Anthony, and each of them, are insolvent and unable to pay said judgment, or any part thereof.

VIII

That plaintiff caused a writ of execution to be issued by the above court upon the said judgment against the defendants therein, R. O. Anthony and Helen B. Anthony, on December 31, 1934; that the same was returned wholly unsatisfied on January 16, 1935.

IX

That all conditions precedent to be performed upon the part of said R. O. Anthony and Helen B. Anthony, as sureties under said policy of insurance, were fully performed by them within the terms of said policy.

Wherefore, plaintiff prays for judgment against the defendant, State Farm Mutual Automobile Insurance Company, a corporation, as follows:

1. For the sum of Five Thousand, Ninety-two Dollars and Fifty-five Cents ($5,092.55) for said injuries and damages and in satisfaction of said judgment;

2. For costs of suit herein incurred; and

3. For such other relief to which the court may find plaintiff entitled.

Parker and Stanbury, by Raymond G. Stanbury, Attorneys for Plaintiff.

[fol. 8] *Duly sworn to by James D. Coughran. Jurat omitted in printing.*

[File endorsement omitted.]

[Endorsed]: Filed Mar. 25, 1935. R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

[fol. 9] In United States District Court Southern District of California

Amended Answer—Filed May 7, 1935

Comes now the defendant, the State Farm Mutual Auto Insurance Company, a corporation, and answering the complaint on file for itself alone and for no other defendant, admits, denies and alleges as follows:

I

This answering defendant denies specifically and positively each, every, all and singular, the allegations of paragraph II of plaintiff's complaint. This defendant alleges that it did issue a policy of insurance to said R. O. Anthony in the words and form as hereinafter attached to this Amended Answer and marked "Exhibit A", and admits that at the time of said accident the policy of insurance as set out in "Exhibit A" was in force and effect.

II

This answering defendant denies specifically and positively each, every, all and singular, the allegations set out in Paragraphs III and IV of plaintiff's complaint.

III

Answering paragraph V of plaintiff's complaint this answering defendant admits that an action was filed against R. O. Anthony and Helen B. Anthony, but denies specifically and positively that the defendant managed and conducted the defense of said action or that said defense was conducted by the defendant under the contract of insurance, but affirmatively alleges that the said Joseph A. Spray did defend the said action under a reservation of rights after having expressly advised the said R. O. Anthony to secure his [fol. 10] own attorney. This answering defendant denies all portions of paragraph V of plaintiff's complaint except those which have been specifically admitted.

IV

This answering defendant admits the allegations of paragraph VI of plaintiff's complaint with the exception that this defendant has no information or belief upon the subject sufficient to enable it to answer the allegation that the plaintiff is the owner of said judgment and basing its denial on that ground denies specifically and positively that the plaintiff is now the owner of said judgment.

V

Answering paragraph VII of plaintiff's complaint, this answering defendant admits that demand has been made upon it for the payment of said judgment and that it has

refused and still refuses to pay the same or any part thereof. Defendant further alleges that it has no information or belief upon the subject as to the insolvency or inability of said R. O. Anthony and Helen B. Anthony to pay said judgment sufficient to enable it to answer that allegation and basing its denial on that ground denies each, and every, all and singular, the allegations referring to the insolvency or inability of R. O. Anthony and Helen B. Anthony to pay the said judgment.

VI

This answering defendant denies specifically and positively the allegations set out in paragraph IX of plaintiff's complaint and affirmatively alleges that R. O. Anthony and Helen B. Anthony have not performed all of the terms of [fol. 11] said contract of insurance in the following particulars:

(a) That the said Chevrolet automobile was not being operated at the time and place of the accident by said Helen B. Anthony or R. O. Anthony or by any one with the consent and permission of R. O. Anthony.

(b) That the said Helen B. Anthony and the assured R. O. Anthony made false and fraudulent representations to this defendant as to who was driving and operating the car at the time of the accident, in this:

That the said Helen B. Anthony and the assured failed to cooperate with the defendant in the preparation and defense of this action as required by the terms of said contract of insurance set out herein as "Exhibit A", and more particularly Part II, Clause E, section 3 thereof.

As and for a further, separate and second affirmative defense to the complaint on file herein this answering defendant alleges:

I

That said accident was an accident for which the defendant under the terms and conditions of said policy is not liable in that: At the time and place of the accident the automobile of the insured was being driven and operated by a person who was not the paid driver of the insured, nor a member of his immediate family, nor a person acting under the direction of the assured. This defendant alleges that

the said automobile at the time of the accident was being driven and operated by a person in violation of the laws of the State of California as to age and as to driver's license [fol. 12] and further alleges that the driver of said car was a minor, being a female of the age of approximately 13 years.

As and for a further, separate and third defense this answering defendant alleges:

I

That the said assured and Helen B. Anthony failed and neglected to comply with the terms of said policy of insurance in the following particulars: That at the time of the accident the assured failed to cooperate as required by the terms of said policy of insurance, in that they failed to make a fair and frank disclosure of the information reasonably demanded by the insurer to enable it to determine whether there was a genuine defense to said action and they represented to the defendant that said automobile was being driven and operated at that time and place by Helen B. Anthony, when in truth and in fact they knew that said statement was false and fraudulent.

As a further, separate and fourth defense this answering defendant alleges:

I

That the assured and Helen B. Anthony by their false and fraudulent representations as to the person who was driving the car at the time of said accident attempted to commit and perpetrate a fraud upon this defendant, to this defendant's damage as follows:

(a) To cause the defendant to believe that the accident was one for which the defendant would be liable under the terms of said contract of insurance.

[fol. 13] (b) To cause the defendant to defend the action against R. O. Anthony and Helen B. Anthony at its own expense.

(c) To hinder and prevent the defendant from denying liability under the terms of said contract of insurance.

As and for a further, separate and fifth defense this answering defendant alleges:

I

That at the time of the trial and as soon as this defendant learned that the representations made by the assured and Helen B. Anthony as to who was driving and operating said car at the time of the accident were false and fraudulent and untrue, this defendant immediately informed R. O. Anthony and Helen B. Anthony that the defendant denied any liability under the said contract of insurance because of the failure of the assured to furnish a true and fair statement as to the circumstances of the accident and because of the failure to cooperate on the part of R. O. Anthony and Helen B. Anthony; and the defendant further informed R. O. Anthony and Helen B. Anthony that they should secure their own attorney to continue the defense of the case; that immediately thereafter the said assured R. O. Anthony signed a non-waiver agreement wherein this defendant denied liability for the accident in that it was not covered by the terms of said contract of insurance and thereafter the said Joseph A. Spray did continue to conduct the defense of said trial against R. O. Anthony and Helen B. Anthony for and on behalf of the assured and not on behalf of this answering defendant.

[fol. 14] As and for a further, separate and sixth defense this answering defendant alleges:

I

That this policy of insurance was void as is provided in same under the heading of "Terms and Conditions Forming a Part of This Policy". Subdivision 9, Section (a) reads as follows:

"(a). This entire policy shall be void if the Assured or his agent has concealed or misrepresented in writing or otherwise any material fact or circumstance concerning this insurance or the subject thereof, or if the Assured or his agent shall make any attempt to defraud the Company either before or after the loss."

This defendant alleges that the assured and Helen B. Anthony knowingly with the intent to deceive and defraud this defendant concealed and misrepresented in writing material facts and circumstances concerning the accident and attempted to defraud the Company after the loss had

occurred, in that they made false representations as to who was driving the car at the time of the accident, and in this: That Helen B. Anthony and R. O. Anthony failed to cooperate as provided for in Part II, Clause E, Section 3 of said contract of insurance.

As and for a further, separate and seventh defense this answering defendant alleges:

I

That the policy provides that no cause of action shall be enforced in any court of law or equity against the insurer unless the assured shall have fully complied with all re-
[fol. 15] quirements of the policy that relate to such loss or damage. The policy provides in the section headed: "Terms and Conditions Forming a Part of This Policy", subdivision 8, as follows:

"No suit or action on this policy for the recovery of any claim on account of loss or damage to the automobile described herein, shall be sustainable in any Court of law or equity unless the Assured shall have fully complied with all the requirements that relate to such loss or damage."

This defendant alleges that the assured and Helen B. Anthony have not fully complied with all requirements of said contract of insurance hereinbefore referred to with relation to said loss or damage, and more particularly that they failed to cooperate as provided for in Part II, Clause E, Section 3, of said contract of insurance in that they failed, neglected and refused to furnish defendant with a true statement as to the facts and circumstances surrounding the happening of the said accident; and therefore the plaintiff has no cause of action under the above section of said policy.

Wherefore, defendant prays judgment against the plaintiff and asks that plaintiff take nothing under the complaint on file herein and that the defendant go hence with its costs and for such other and further relief as may seem meet and just in the premises.

Joseph A. Spray of Frankley and Spray, Attorney for Defendant.

[fol. 16] *Duly sworn to by Joseph A. Spray. Jurat omitted in printing.*

(Here follow 4 photolithographs, side folios 16a, 16b, 16c and 16d)

EXHIBIT "A" TO AMENDED ANSWER 10A

COPY

WESTERN DEPARTMENT

No. Calif. 56362

OPTIONAL COVERAGE FORM

State Farm Mutual Automobile Insurance Company
OF BLOOMINGTON, ILLINOIS

IN CONSIDERATION of the statements made by the Assured in the application heretofore signed, which application forms a part of this contract as though it were fully recited herein, and of the membership fee and premium deposit which shall entitle the applicant to insure in this company as shown in the following schedule.

	Membership	Premium Deposit
Section 1. Fire, Transportation, Tornado, etc. and Theft....	$ 5.00	$ 5.00
Section 2. For Collision.....	$	$
Section 3. For Liability and Property Damage.....	$ 5.00	$ 9.00
Total:.....	$ 10.00	$ 14.00

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

hereinafter called the "Company" does hereby insure R. O. Anthony of the City of Orange, State of California, hereinafter called the "Assured," from the 1st day of March A. D. 19 32, at 12:00 o'clock noon Standard time to the 1st day of September A. D. 19 32 at 12:00 o'clock noon Standard time and for such terms of six months each thereafter as the premium deposit is restored as required by this policy and the application therefor, subject to the terms and conditions of this policy while the automobile insured is within the limits of the United States (excluding Alaska, the Hawaiian Islands and Porto Rico) and Canada.

The liability of this Company under Part I of this policy shall in no event exceed Three hundred fifteen ---------- DOLLARS, and is subject to the terms and conditions forming a part of this policy.

The following is a description of the automobile covered by this policy.

Name of Car	List Price	Engine Number	Serial Number	Year Built	Type of Body	No. of Cyls.	Purch. Price
Ford & Trailer	"A"	A2710633		1930	2 Door Sedan	4	$650.

PERILS INSURED AGAINST

Part I—Fire, Transportation, Tornado, etc., Theft and Collision

Against actual, direct loss or damage to the body, machinery and equipment of the automobile described herein, while this policy is in force, to an amount not exceeding that specified herein, caused solely by

Clause A—Fire. Fire, from any cause, and Lightning.

Clause A-1—Transportation. While being transported in any conveyance by land or water—stranding, sinking, collision, burning or derailment of such conveyance, including general average and salvage charges for which the Assured is legally liable.

Clause A-2—Tornado, Cyclone, Windstorm or Hail, Earthquake, Explosion. Direct loss or damage caused by tornado, cyclone, windstorm or hail (excluding damage done by rain, sleet or snow, whether driven by wind or not), earthquake, explosion (excluding rupture of tires and explosions within the combustion chamber of an internal combustion engine) and accidental and external discharge or leakage of water, but in no event to include damage by flood.

Clause B—Theft. Theft, robbery or pilferage, excepting by members of the same household as the Assured or by any person or persons in the service or employment of the Assured (whether during the hours of such service or employment or not) but not including theft, robbery or pilferage of tools, chains, and repair equipment in any case. Extra tires, tubes, rims, wheels and other accessories properly attached are covered.

Clause C—Collision. Accidental collision with any animal, vehicle, or the rolling stock of a public carrier. The liability of the Company shall not exceed eighty per cent (80%) of the actual loss nor in any event eighty per cent (80%) of the insurance on the property described herein at the time of loss. The company shall not be liable for collision damage to tires.

"TRAILER TO HAVE LIABILITY AND PROPERTY DAMAGE PROTECTION ONLY."

Part II—Property Damage and Liability

Against legal liability imposed upon the Assured resulting solely and directly from an accident by reason of the ownership, maintenance or use of the automobile described herein while the policy is in force not exceeding the amount specified in Clauses D and E respectively on account of

Clause D—Property Damage. Damage to property, other than property of or in charge of the Assured; or property of or in charge of members of the same household as the Assured or persons in the service or employment of the Assured (whether occurring during the hours of such service or employment or not); or property carried in or upon the automobile described herein, to an amount not exceeding Two thousand ---------- DOLLARS as a result of any one accident.

Clause E—Liability. Bodily injury and/or death suffered or alleged to have been suffered by any person, other than the Assured or members of the same household as the Assured, or those in the service or employment of the Assured (whether occurring during the hours of such service or employment or not) to an amount not exceeding Ten thousand ---------- DOLLARS for one person and, subject to the same limit as to each person, to an amount not exceeding Twenty thousand ---------- DOLLARS for two or more persons suffering bodily injury and/or death as a result of any one accident.

The Company also agrees without additional premium deposit to render the following service in connection with accidents covered under Clauses D and E:

To investigate any such accident, upon receiving notice thereof, and to endeavor to make amicable settlement of any resulting claim.

To defend, in the name of the Assured, any suits which may be brought against the Assured by reason of any such accident and to pay all expense of litigation on account of suits brought against the Assured by reason of any such accident, and all costs taxed against the Assured in any such legal proceeding defended by the Company, together with interest accruing after entry of judgment upon such part thereof as shall not be in excess of the liability of the Company on account of such accident.

To furnish such immediate necessary medical and/or surgical first aid at the time of the accident as will alleviate suffering.

Terms and Conditions Forming a Part of this Policy

(1) **Risks Not Assumed by This Company.** The Company shall not be liable and no liability or obligation of any kind shall attach to the Company for losses or damage: (A) To robes, wearing apparel or personal effects under Part I above; (B) To any parts of the body, machinery and equipment of the automobile herein described

while kept or stored separately or while not connected with said automobile; (C) Caused directly or indirectly by flood, invasion, insurrection, riot, civil war or commotion, military, naval or usurped power or by order of any civil or military authority; (D) Unless the said automobile is being operated by the Assured, his paid driver, members of his immediate family, or persons acting under the direction of the Assured; (E) Caused while the said automobile is being driven or operated by any person whatsoever either under the influence of liquor or drugs or violating any law or ordinance as to age or driving license; (F) If the automobile described herein is used in carrying passengers for compensation (actual or implied) or as a taxicab, or is rented, or leased, or is operated in any race or speed contest, or is used for the transportation of high explosives of any nature, intoxicating liquors, or for the illegal transportation of any property; (G) If the interest of the assured in the automobile described herein is at any time other than sole and unconditional ownership, or if the car becomes incumbered by a lien, mortgage, or other charge, except as may be specifically endorsed hereon; (H) If the policy or any part thereof or interest therein shall be assigned or transferred to any other person without the consent of the Company endorsed hereon; (I) Because of any obligation assumed or imposed upon the Assured by or under any employer's liability or workmen's compensation law, plan, or agreement; (J) If at the time a loss occurs there be any other insurance covering against risks assumed hereunder, (unless so stated in the application or specially endorsed hereon) whether such other insurance be valid and/or collectible or not, which would attach if this insurance had not been effected; (K) For any liability of the kind covered by Clauses D and E of this policy which the Assured may have accepted or rendered himself liable for by verbal or written agreement without the consent of the Company; (L) Where the Assured has made claim against anyone other than the Company without the consent of the Company.

(2) **Instructions in Case of Fire, Transportation, Tornado, etc., Theft or Collision, etc.** (A) In the event of loss or damage to the automobile herein described the Assured shall within Five (5) days give notice thereof by telephone, telegraph or letter, with the fullest information obtainable at the time, to the Company at its office at Berkeley, California, and to the nearest known agent of the Company and shall protect the property from further loss or damage; and within thirty (30) days thereafter unless such time is extended in writing by the Company, shall render a statement to the Company at the above office, signed and sworn to by said Assured, stating the knowledge and belief of the Assured as to the time and cause of the loss or damage, the interest of the Assured and all others in the property; and the Assured, as often as required, shall exhibit to any person designated by the Company all that remains of any property herein described, and submit to examination under oath by any person named by the Company, and subscribe the same; and, as often as required, shall produce for examination all books of accounts, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by the Company or its representative, and shall permit extracts and copies thereof to be made. It is a condition of this policy that failure on the part of the Assured to render such sworn statement of loss to the Company within thirty (30) days of the date of loss (unless such time is extended in writing by the Company) shall render such claim null and void; (B) Any act of the Assured or the Company, or its agents, in recovering, saving, and preserving the property described herein in case of loss or damage, shall be considered as done for the benefit of all concerned and without prejudice to the rights of either party, and all reasonable expenses thus incurred shall constitute a claim under this policy; (C) In the event of disagreement as to the amount of loss or damage to the automobile described herein, the same must be determined by competent and disinterested appraisers before recovery can be had hereunder. The Assured and the Company shall each select one, and the two so chosen shall then select a competent and disinterested umpire. Thereafter the appraisers together shall estimate and appraise the loss or damage, which shall be the cost of repairing and/or replacing the damaged automobile, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss or damage; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire. The Company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act or proceeding on its part relating to the appraisal or to any examination herein provided for; and the sum for which the Company is liable for loss or damage to the automobile herein described, pursuant to this policy, shall be payable sixty (60) days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required, have been received by the Company, including an award by appraisers when appraisal is required hereunder.

(3) **Instructions in Case of Property Damage or Liability Accidents.** (A) Upon the occurrence of an accident covered by this policy involving injuries to persons or damage to the property of others, the Assured shall give immediate notice thereof by telephone, telegraph or letter, with the fullest information obtainable at the time, to the above office of the Company at Berkeley, California, and to the nearest known agent of the Company. If any claim is made on account of such accident against the Assured, he shall give like notice thereof with full particulars. The Assured shall at all times render to the Company all co-operation and assistance in his power; (B) If suit is brought against the Assured to enforce a claim for damages covered by this policy, the Assured shall immediately forward to the Company every notice, summons or other process as soon as served upon the Assured, and the Company will, at its own cost, defend such suit in the name and on behalf of the Assured. It is also a condition of this insurance that the Assured when requested by the Company, shall aid in effecting settlements, securing information and evidence, securing the attendance of witnesses and in prosecuting appeals and shall throughout such litigation actively co-operate with the Company and its representatives in the defense thereof and attend upon any hearing or hearings therein when requested by the Company or its representatives but the Assured shall not voluntarily assume any liability, settle any claim, interfere in any settlement or legal proceeding, or incur any expense, except at his own cost, without the consent of the Company previously given in writing, except that as respects injuries, for which there might be liability under Clause E, the Assured may provide at the expense of the Company such immediate medical and/or surgical first aid as is imperative at the time of the accident.

Notice, under 2 or 3 to an authorized agent of this Company sufficient to identify the insured shall be deemed sufficient notice to the Company. Failure to give notice will not invalidate the policy, if it is shown that the Assured could not reasonably give notice.

(4) **Automatic Reinstatement.** In the event of loss or damage to any automobile described hereunder, whether such loss or damage is covered by this policy or not, the liability of the Company under this policy shall be reduced by the amount of such loss or damage until repairs have been completed but shall then attach for the amount insured under this policy less the natural valued depreciation, without additional charge.

(5) **Inspection.** The Company shall have the right to inspect the automobile hereunder insured at any and all reasonable times while this policy is in force.

(6) **Repair and Replacement.** It shall be optional with the Company, within a reasonable time, to repair or replace property damaged or destroyed with other of like kind and quality or to return or replace property stolen, but there can be no abandonment to the Company of the property described. Upon payment of loss either total or partial, the remaining parts or salvage shall become the property of the Company.

(7) **Subrogation.** If the Company shall claim that any loss or damage insured under this policy was caused by act or neglect of any person, firm or corporation, private or municipal, the Company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the Assured for the loss resulting therefrom, and such right shall be assigned to the Company by the Assured immediately on receiv-

ing such payment and the Assured shall execute all papers required and shall co-operate with the Company and its representatives to secure its rights, by suit or otherwise. It is a condition of this policy that this insurance shall not inure to the benefit of any carrier whatsoever, but the right of the Assured to recover under this policy shall not be prejudiced by any release from liability which may have been given to any railroad or other carrier or bailee in any bill of lading or other contract of carriage or storage, and the Company succedes to the Assured the right to give such release; any right of recovery the Assured is entitled to against said carrier or others shall, by subrogation, inure to the benefit of the Company upon payment of the claim and the Company shall be entitled, if it so desires, to take over and conduct in the name of the Assured, the defense of any action or to prosecute any claim for indemnity, damages or otherwise against any third party.

(8) **Suits Against the Company.** No suit or action on this policy for the recovery of any claim on account of loss or damage to the automobile described herein, shall be sustainable in any Court of law or equity unless the Assured shall have fully complied with all the requirements that relate to such loss or damage, nor until forty (40) days after the same shall become due, nor unless commenced within twelve (12) months next after the happening of the loss; nor shall any action to recover for any loss covered by this policy, arising or resulting from claims upon the Assured for damages, be sustainable unless it shall be brought by the Assured after the amount of damages for which the Assured is liable, by reason of any casualty covered by this policy, is determined either by a final judgment against the Assured or by agreement between the Assured and the plaintiff with the written consent of the Company, nor unless such action is brought within two (2) years after the rendition of such final judgment; provided, however, that where any such limitations of time are prohibited by the laws of the state wherein this policy is issued, then and in that event no suit or action under this policy shall be sustainable unless commenced within the shortest limitation permitted under the laws of such state.

(9) **Misrepresentation or Fraud, or Default in Required Payment When Due Voids the Policy.** (A) This entire policy shall be void if the Assured or his agent has concealed or misrepresented in writing or otherwise any material fact or circumstance concerning this insurance or the subject thereof, or if the Assured or his agent shall make any attempt to defraud the Company either before or after the loss. (B) This entire policy shall automatically and immediately be void without notice of cancellation or notice of any other kind: (1) If there shall be default of any kind, or for any reason whatsoever, in payment of the check given for the membership fee or premium deposit when the same is due and presented for payment; (2) If the Assured or his agent defaults in his obligation to make any other payment legally required of him by the Board of Directors to meet his share of the losses, expenses and liabilities of the Company as set forth in paragraph 14 of this policy within thirty (30) days after notice of such payment due is given in writing. (C) If Assured shall be in default in the payment of either the original membership fee or premium deposit or of any other payment, the Company may, at its option, accept said payment, but the making of said payment and the receipt thereof by the Company shall in no case revive or create any liability against the Company for loss occurring while the Assured was so in default and the policy void. (D) In the event of valid loss sustained by the Assured while the policy was in force and while any payment not in default is owing to the Company, the amount thereof shall first be paid by deducting it from the loss and the policy shall thereupon, unless cancelled as provided in paragraph (10), remain in force for the balance of the current term.

(10) **Cancellation.** This policy may be cancelled at any time by the Assured by written notice to the Company at its office at Berkeley, California, or may be cancelled by the Company by giving five (5) days notice in writing of such cancellation, mailed to the Assured at the address stated in the policy, which shall be sufficient notice. If this policy shall be cancelled as herein provided, the premium deposit having been paid, or restored as provided for in the application, the unearned portion of such premium deposit shall be returned on surrender of the policy, the Company retaining the customary short rate, except that when this policy is cancelled by the Company by giving notice it shall retain only the pro rata premium deposit. The check of the Company, mailed to the Assured at the address stated in the policy, shall be a sufficient tender of unearned premium deposit. Such cancellation shall be without prejudice to any claim originating prior thereto. In event this policy is lapsed by the Assured or becomes void or ceases, the premium deposit shall be retained by the Company.

(11) **Policy.** This policy, together with the application, shall constitute the entire contract between the Company and the Assured, and no change in the agreements, statements, terms, conditions or representations of this policy, either printed or written, shall be valid unless made by endorsement hereon signed by a duly authorized officer of the Company, and notice to or knowledge possessed by any Agent or any other person shall not be held to waive, alter or extend any of such agreements, statements, terms, conditions, or representations.

(12) **Membership Fee.** The membership fee paid for this insurance shall entitle the Applicant to insure one automobile for the kinds of insurance and for the term set forth in the application so long as this Company shall continue to write such kinds of insurance, and such Applicant shall remain a desirable risk.

(13) **Depreciation.** The amount for which the automobile described in the application is insured under Part I, shall take a natural depreciation of two percent (2%) per month, or any part thereof, for the first twenty-four (24) months succeeding the date when the insurance takes effect and one percent (1%) per month or any part thereof, thereafter.

(14) **Mutuality of Policy.** The Assured by accepting this policy becomes a member of this Company, and upon cancellation or other termination of the policy, shall cease to be a member. The Assured agrees to make the payments provided for in this policy, when and as required by the Board of Directors and agrees to co-operate with the Company in preventing losses as far as possible to the end that the cost of insurance may be reduced to the lowest point consistent with solvency and sound insurance protection. The premium deposit set out in this policy is for insurance during the initial period hereinabove designated and for such terms of six (6) months each thereafter for which the premium deposit is restored. If, for the purpose of restoring the premium deposit, the Assured shall pay his share of the losses, expenses and liabilities as required by the Board of Directors, the insurance shall be renewed automatically for a six (6) months period from the expiration of the preceding period. Such premium deposit shall be treated as earned pro rata during each period. The Board of Directors may require additional payments to meet losses, expenses and liabilities in excess of the earned premium deposit but no such payments shall be required in excess of an amount equal and in addition to the premium deposit. The Assured shall be liable only for losses, expenses and liabilities incurred during the period for which he was insured and the total contingent liability of the Assured is limited to an amount equal and in addition to the amount of premium deposit set out in this policy.

(15) **Insolvency or Bankruptcy of Assured.** The insolvency or bankruptcy of the Assured shall not release the Company from the payment of damages for injuries sustained or loss occasioned during the life of the policy, and in case execution against the Assured is returned unsatisfied in an action brought by the injured, or his or her personal representative in case death results from the accident, because of such insolvency or bankruptcy, then an action may be maintained by the injured person or his or her personal representative against this Company under the terms of this policy, for the amount of the judgment in the said action not exceeding the amount of this policy.

(16) **Date of Annual Meeting.** The annual meeting of the members of the Company shall be held at the home office of the Company at Bloomington, Illinois, on the second Monday of June at the hour of 10 A.M., unless

the Board of Directors shall elect to change the time and place of such meeting, in which case, but not otherwise, due notice shall be mailed each member at his last known address at least ten (10) days prior thereto.

IN WITNESS WHEREOF, THE STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY has caused this policy to be signed by its President and Secretary, but the same shall not be binding upon the Company unless countersigned by a duly authorized officer or representative of the Company.

ATTEST:

Geo E Beadle
Secretary.

G J Mischke
President.

Countersigned at Berkeley, California, this 1st day of March 1937

Authorized Representative.

COPY

WESTERN DEPARTMENT

Optional Coverage Automobile Policy

State Farm Mutual Automobile Insurance Company

HOME OFFICE AT

BLOOMINGTON, ILLINOIS

A Licensed Legal Reserve Mutual

Address all communications relative to this policy or claim thereunder to:

Western Department
State Farm Mutual Automobile Insurance Co.
Mercantile Bank Bldg.
Berkeley, California

Please Read Your Policy

No. 7716-W
Complaint
Rec'd Jun
Chk
No. 4
Filed 7/13/36
R. B. Zook Clerk Superior Court
By [illegible] Deputy

Policy

IMPORTANT NOTICE

The Assured is notified that by virtue of this policy, he is a member of the State Farm Mutual Automobile Insurance Company, Incorporated under the Uniform Mutual Laws of the State of Illinois.

Annual meeting Second Monday in June at 10 o'clock A.M.

Report every accident, HOWEVER SLIGHT, on the law report enclosed with your policy for that purpose. Fill in the report according to paragraph (2) or (3) of your policy. Always secure the names of disinterested witnesses. If another automobile is involved, secure its license number.

The State Farm Mutual Automobile Insurance Company is a Mutual Company and the cost of insurance to our policy holders is dependent upon our loss. Careful driving will reduce the cost of insurance. The Company does not accept members unless they have a reputation for honesty, industry and integrity and does not desire to insure persons who do not own property, or who cannot afford to own or operate an automobile. By confining our members to this class of persons, the cost of insurance can be kept low as the Company will not be called upon to pay fraudulent and dishonest claims.

If experience shows that more liberal protection can be safely given to our members without materially increasing the cost of insurance, such additional protection will be given.

This Company is operated for the benefit of its policy holders and the greater co-operation given by the members, the greater benefit they will derive from the Company in usual protection at the lowest cost consistent with safety.

Remember! A Careful Driver Reduces Insurance Costs!

16-d

[Endorsed]: Received copy of the within Amended Answer this 7th day of May, 1935 Parker & Stanbury, H. Attorney for plff.

[File endorsement omitted.]

[fol. 17] IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law—Filed March 23, 1936

The above case came on regularly for trial in the above court before the Honorable Paul J. McCormick, Judge Presiding, on February 13th, 1936, plaintiff being present in court and represented by his attorneys, Parker & Stanbury by Raymond G. Stanbury, and the defendant being represented by its attorneys, Joseph Spray and F. Britton McConnell, a jury trial having been waived, evidence having been introduced on February 13th and February 14th, 1936, both parties having rested and the court being fully advised in the premises, herewith makes its findings of fact and conclusions of law.

FINDINGS OF FACT

I

The court finds that it is true that the defendant, State Farm Mutual Automobile Insurance Company, is and at all times referred to, has been a corporation authorized and licensed by the State of California to conduct therein a general automobile insurance business; that it is organized under the laws of the State of Illinois and that it at all times referred to has maintained an office for the conducting of its business in the County of Los Angeles, State of California.

II

That prior to June 16th, 1934, the said defendant, for a consideration, made, executed and delivered in the County of Los Angeles, State of California, to one R. O. Anthony,

[fol. 18] a policy of insurance, said policy of insurance being the one received in evidence as Exhibit "A" and being attached as an exhibit to defendant's original answer herein. That the said policy was in full force and effect on June 16th, 1934. The court herewith makes a part of these findings of fact the said contract of insurance and all of its terms and conditions the same as if said contract of insurance were expressly incorporated herein.

III

The court finds that on or about the 16th day of June, 1934, and while said policy was in full force and effect, one Helen B. Anthony operated the Chevrolet automobile referred to in and covered by the said policy of insurance with the permission and consent of the assured, R. O. Anthony, and operated the same negligently so as proximately to cause an accident and injury to the person and property of the plaintiff to his damage in the reasonable sum of Five Thousand Ninety-two and 55/100 Dollars ($5092.55).

IV

The court finds that it is true that the plaintiff, after the occurrence of said accident and within the time prescribed by law, commenced an action in the Superior Court of the state of California, in and for the County of Los Angeles, against the said R. O. Anthony as the owner of said insured automobile and against the said Helen B. Anthony as driver and operator thereof, to recover damages for the personal injuries and property damage proximately caused in said accident and by the negligence of the said Helen B. Anthony, which negligence was imputed to the assured, R. O. Anthony. That the complaint and summons served upon [fol. 19] the assured, R. O. Anthony, and the said Helen B. Anthony in said action were delivered to the defendant according to the terms of the said contract of insurance and that the said defendant managed and conducted the defense of said action in the state court insofar as its conduct affects the plaintiff in this action, but that the defendant did so subject to the terms of the non-waiver agreement received in evidence and marked Exhibit "—". That the complaint and summons in the action in the state court, which were delivered to the defendant alleged that Helen

B. Anthony was the driver of the automobile insured, at the time of the accident.

V

The court finds that it is true that thereafter, on or about October 30th, 1934, plaintiff recovered a judgment in said action in the state court against the said R. O. Anthony and Helen B. Anthony, and each of them, for said injuries and damages in the sum of Five Thousand Ninety-two and 55/100 Dollars ($5092.55), and that the said judgment was at the time of the commencement of the present action and ever since has been final.

VI

The court finds that it is true that the plaintiff, prior to the commencement of this action made demand upon the defendant for the payment of said judgment but that the defendant refused and at all times has refused to pay the same or any part thereof. That the said judgment is wholly unpaid and the plaintiff is now and at all times since the rendition of said judgment has been the owner thereof and entitled to the payment thereof.

VII

The court finds that it is true that the said assured, R. O. Anthony, and Helen B. Anthony, and each of them, are and [fol. 20] at all times since the rendition of said judgment have been insolvent and unable to pay said judgment or any part thereof, and that no part of said judgment has been paid by any person whatsoever.

VIII

The court finds that it is true that prior to the commencement of this action, plaintiff caused a writ of execution to be issued in the Superior Court of the State of California, in and for the County of Los Angeles, upon the judgment herein referred to, against the assured, R. O. Anthony and Helen B. Anthony, but that the same, prior to the commencement of this action, was returned wholly unsatisfied. The court finds that all conditions precedent to be performed upon the part of the assured, R. O. Anthony, under the terms of said policy of insurance so far as they affect

this plaintiff, were fully performed according to the terms of said policy of insurance.

IX

The court finds that it is true that the defendant, prior to the trial of the action in the state court entered into the non-waiver agreement received in evidence in this action with the assured, R. O. Anthony, and with Helen B. Anthony. That the said non-waiver agreement was executed just prior to the commencement of the trial of the state court action. That the plaintiff was not a party to that agreement and had no knowledge of any facts referred to therein and was not in privity with any of the defendants in the state court action and that so far as the conduct of the defendant affects the plaintiff in this action, the defendant managed and conducted the defense in the state court.

[fol. 21]

X

The court finds that at no time did the assured, R. O. Anthony authorize, direct or instruct or in any manner, expressedly or impliedly, authorize Helen B. Anthony to make any untrue statement or statements or untrue or false representations to the defendant or its agents or employees. That the assured at all times fully and fairly, as far as he knew or had means of knowledge, disclosed the truth concerning the accident in question and that nothing said, done or authorized by the said assured, R. O. Anthony, misled or prejudiced the defendant company in any manner or particular. That no statements or representations or concealments of Helen B. Anthony, with respect to the accident or the identity of the driver or operator, were in any manner participated in or ratified by the assured, R. O. Anthony.

XI

That prior to the trial of the action in the state court herein referred to, the defendant, through its attorney, Joseph A. Spray, had knowledge of the fact that another person, one Nancy Leidenacker, was also occupying the driver's seat of the insured automobile at the time of the accident and of all other facts and circumstances concerning the identity of the persons occupying said automobile and their positions therein, and all other facts and cir-

cumstances regarding said accident. That the said non-waiver agreement referred to was demanded by defendant and executed because of such ascertainments by the defendant and the said Joseph A. Spray on its behalf, as to the presence of the said Nancy Leidenacker in said automobile and her position therein. The court finds that no prejudice resulted to the defendant from any of the con-
[fol. 22] duct herein found to have taken place by the said Helen B. Anthony.

XII

With regard to the second separate defense of defendant, the court finds that the said automobile at the time of the impact that resulted in the injury to the plaintiff was being jointly operated by Helen B. Anthony and Nancy Leidenacker; that said Helen B. Anthony was a member of the assured's immediate family and was an adult person over the age of twenty-one (21) years who was licensed by the state of California to drive an automobile; and that said Nancy Leidenacker was a minor and not permitted under the applicable laws to operate a motor vehicle in the State of California; that the assured had forbidden said minor Nancy Leidenacker to drive any motor vehicle or automobile of which he was the owner or which he controlled; and that the action of said Nancy Leidenacker on the day of the accident and at the time of the impact involved in this action were in disobedience of and contrary to the commands, orders and instructions of the assured, R. O. Anthony; that at the time of the accident, insofar as the propulsion of the vehicle was concerned, other than the means of direction, all instrumentalities of said automobile were being physically actuated by said minor Nancy Leidenacker, with the acquiescence and knowledge of Helen B. Anthony and without any knowledge, acquiescence or consent on the part of the assured, R. O. Anthony; that the proximate and direct cause of the collision between the insured automobile and
[fol. 23] a truck owned by San Pedro Commercial Company was the act of Helen B. Anthony in seizing the steering wheel of the automobile at and immediately preceding the moment of impact and collision.

XIII

The court finds in connection with the third separate defense of the defendant that it is not true that the assured failed to cooperate as required by the terms of the said policy of insurance and that it is not true that the assured failed to make a fair and frank disclosure of the facts reasonably demanded by the defendant to enable it to determine whether there was a genuine defense to said action and that it is not true that the assured knowingly represented any fact to the defendant which was not true or which was fraudulent.

XIV

The court finds in connection with the fourth separate defense of the defendant that it is not true that the assured made any false or fraudulent representations as to the person who was driving the car at the time of the accident and that it is not true that the assured attempted to or did commit any fraud upon the defendant to the defendant's damage, or otherwise, in any of the particulars set forth in said defense in defendant's answer, or otherwise.

XV

The court finds in connection with the fifth, sixth and seventh separate defenses of the answer that it is true that [fol. 24] the defendant entered into with the assured and the said Helen B. Anthony a non-waiver agreement as hereinabove stated and that it is true that the said policy of insurance contains as part of its terms and conditions those paragraphs quoted in said answer, but the court finds that it is not true that any false, untrue or fraudulent representations were made by the assured as alleged, or otherwise, and that it is not true that the assured failed to furnish to the defendant a true and fair statement of the circumstances as known to him and that it is not true that the assured failed to cooperate with the defendant, that it is not true that the assured had at any time any intent to deceive or defraud the defendant as alleged, or at all, and that it is not true that the assured concealed or misrepresented in writing, or otherwise, any facts or circumstances concerning said action, but the court finds, on the contrary, that the assured fully performed all the conditions of said policy and ren-

dered and furnished to the defendant all the cooperation required or asked of him.

XVI

That prior to the commencement of the trial of the said State court action the defendant had full knowledge of all the facts and circumstances concerning the presence of the said Nancy Leidenacker in the driver's seat or in a part of said seat, and all other facts relied on by the defendant as constituting a concealment and a defense of the case at bar, but that the defendant did not reveal said facts to the plain- [fol. 25] tiff or his counsel, and that plaintiff and his counsel had no knowledge that the said Nancy Leidenacker occupied any part of the driver's seat until said trial was completed.

XVII

The court finds that prior to the collision between the insured automobile and a truck owned by the San Pedro Commercial Company, Helen B. Anthony seized the steering wheel of the insured automobile and steered the same to the right, proximately causing the same to come into collision with the said truck and proximately causing the same to turn to its right, proximately causing the collision of plaintiff's car and the injuries and damages suffered by him.

Conclusions of Law

From the foregoing facts, the court concludes as a matter of law that the plaintiff is entitled to have and recover of the defendant herein judgment in the sum of Five Thousand, Ninety-two Dollars and Fifty-five Cents ($5,092.55) together with interest thereon from October 30th, 1934, at the rate of seven per cent (7%), and costs of suit herein incurred.

Dated March 23rd, 1936.

Paul J. McCormick, Judge.

[File endorsement omitted.]

[fol. 26] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 7126-M

JAMES D. COUGHRAN, Plaintiff,

vs.

STATE FARM MUTUAL AUTO INSURANCE CO., a Corporation, Defendant

JUDGMENT—Filed March 23, 1936

The above case came on regularly for trial in the above court before the Honorable Paul J. McCormick, Judge Presiding, on February 13th, 1936, plaintiff being present in court and represented by his attorneys, Parker & Stanbury, by Raymond G. Stanbury, and the defendant being represented by its attorneys, Joseph Spray and F. Britton McConnell, a jury trial having been waived, evidence having been introduced on February 13th and February 14th, 1936, both parties having rested and the court being fully advised in the premises, the court having made and filed its Findings of Fact and Conclusions of Law, it is hereby

[fol. 27] Ordered, Adjudged, and Decreed that the plaintiff, James D. Coughran, have and recover of the defendant, State Farm Mutual Automobile Insurance Company, a corporation, the sum of Five Thousand, Ninety-two Dollars and Fifty-five Cents ($5,092.55) together with interest at the rate of seven per cent (7%) from October 30th, 1934, to the date of this judgment, said interest being in the sum of $—, together with costs herein incurred, taxed at $61.43.

Dated March 23rd, 1936.

Paul J. McCormick, Judge.

Judgment entered and recorded March 23, 1936.

R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy Clerk.

[Endorsed]: Received copy of the within this 5 day of Mar. 1936. Joseph A. Spray, Attorney for Def.

[File endorsement omitted.]

[fol. 28] IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed June 29, 1936

Be it Remembered, that heretofore, to-wit, on the 13th day of February, 1936, the above entitled cause came on for trial in the above entitled court upon the issues joined herein, before the Honorable Paul J. McCormick, sitting as a Judge of said court without a jury, a jury having been duly waived by the parties by written stipulation, in words and figures as follows, to-wit:

STIPULATION WAIVING JURY TRIAL

"It is Hereby Stipulated by and between the parties to the above entitled action, through their respective counsel, that a trial by a jury be, and hereby is waived by both parties to the above entitled action.

Dated February 4, 1936.

Parker & Stanbury, by Raymond G. Stanbury, Attorneys for Plaintiff. Joseph A. Spray, Attorney for Defendant."

Whereupon the parties respectively offered and introduced the following evidence and exhibits of evidence, and the following evidence was rejected, and objections and motions made, and rulings of the court entered, and exceptions taken by the court, all as follows, to-wit:

APPEARANCES

James D. Coughran, Plaintiff, by his attorneys, Harry D. Parker and Raymond G. Stanbury, by Raymond G. Stanbury, and Vernon W. Hunt; State Farm Mutual Automobile [fol. 29] Insurance Company, a corporation, Defendant, by its attorneys, Joseph A. Spray and F. Britton McConnell.

Statement of Case

This is an action upon a judgment rendered by the Superior Court of the State of California, in and for the County of Los Angeles, against R. O. Anthony and Helen B. Anthony, in favor of James D. Coughran, for personal injuries sustained in an automobile accident which occurred in the County of Los Angeles on the 16th day of June, 1934. Said Judgment rendered in favor of the Plaintiff James D. Coughran against the defendants R. O. Anthony and Helen B. Anthony has not been satisfied, either in whole or in part. The present action was brought by the plaintiff James D. Coughran against the defendant State Farm Mutual Automobile Insurance Company, a corporation, upon a policy of automobile liability insurance.

Stipulations as to Certain Facts

It was stipulated in open court by and between the plaintiff and defendant, by their respective counsel, as follows:

It was stipulated that R. O. Anthony and Helen B. Anthony have been at all times since the 16th day of June, 1934, and still are insolvent and that the judgment duly made and entered against said R. O. Anthony and Helen B. Anthony by the Superior Court of the State of California, in and for the County of Los Angeles, in that certain action entitled "James D. Coughran, Plaintiff, vs. San Pedro Commercial Company, Inc., a corporation, et al., Defendants, No. 377,-[fol. 30] 240," has not been collected in any part or satisfied in any part by R. O. Anthony and Helen B. Anthony, or either of them.

It was stipulated that the judgment secured in the Superior Court was wholly unpaid by either of the defendants, or otherwise.

It was stipulated that at the time of the accident Mrs. Anthony had the permission of the defendant, R. O. Anthony, owner of the car, to use the same.

It was stipulated that the automobile involved in the accident occurring on the 16th day of June, 1934, was the same automobile which was covered by the policy of insurance insured upon by the present action.

It was stipulated that the policy of insurance sued upon was the same identical contract in all its terms and condi-

tions which was attached to the defendant's Answer in this action and marked in said Answer as Exhibit "A" and incorporated in said Answer as a part thereof by reference.

It was stipulated that no contention was made by the defendant with respect to any variance between the allegations of the complaint and said policy of insurance which is attached to defendant's Answer, marked Exhibit "A", and that the complaint should be deemed to state its cause of action upon the said Exhibit "A".

And thereupon the plaintiff James D. Coughran, to maintain the issues on his part, introduced the following evidence, to-wit:

[fol. 31] HELEN B. ANTHONY, called as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

On direct examination she testified that on June 16, 1934, she was over the age of 21 and the wife of R. O. Anthony, who, with herself, was a defendant in the Superior Court action aforementioned; that on said date she was involved in an automobile accident; that at said time she was duly licensed to drive a motor vehicle. She was served with processes, she testified, in the aforementioned Superior Court action, which she sent to the defendant insurance company. She was advised by the insurance company she stated, that Joseph A. Spray, Esq., would be her attorney in said action, and that he was the representative of the defendant insurance company.

On cross-examination she testified that on June 18th, 1934, W. S. Ronk, from the defendant insurance company, came to her home in Villa Park, near Orange, California, where she resided with her husband, at which place they conducted a school, and that she gave and signed a written report as to how the accident happened.

On redirect examination she testified that Joseph A. Spray, Esq., represented her and her husband, R. O. Anthony, in the Superior Court action, and that they had no other attorney.

[fol. 32] On recross-examination, Helen B. Anthony testified that she and her husband executed a non-waiver agree-

ment dated October 29th, 1934, at the request of Joseph A. Spray, Esq., and that he told her if they refused to sign they would have to secure their own attorney. Thereupon, the defendant introduced in evidence said non-waiver agreement marked defendant's Exhibit "A", which provided that no action heretofore or hereafter taken by the defendant insurance company should be construed as a waiver of any right of the defendant insurance company to deny liability to Helen B. and R. O. Anthony under the policy of insurance which they claimed covered the said automobile accident. The non-waiver agreement also provided that its execution by Helen B. and R. O. Anthony did not waive any right which they had under said policy.

Whereupon, the plaintiff introduced in evidence in this cause, as plaintiff's Exhibit "1," the complaint and the answer of Helen B. and R. O. Anthony in said Superior Court Action, wherein James D. Coughran, plaintiff, brought suit against the San Pedro Commercial Company, Helen B. and R. O. Anthony for damages, for personal injuries, and property damage arising out of a collision occurring between an automobile being driven by the defendant Helen B. Anthony, owned by the defendant, R. O. Anthony, out of which collision the plaintiff received injuries and damage to his person and property, which were alleged to have resulted from negligent acts on the part of the defendant, Helen B. Anthony. That the said complaint alleged that at the [fol. 33] time of the accident the said Helen B. Anthony was the driver of the automobile owned by R. O. Anthony and that the same was driven by the said Helen B. Anthony with the permission and consent of the said R. O. Anthony. The Answer of the defendants, Helen B. and R. O. Anthony denies the allegations of plaintiff's Complaint, save and except that the Answer admits that R. O. Anthony was the owner and that the said car was being driven with his consent and permission by Helen B. Anthony. The Answer also sets up the defense that the accident was unavoidable, and the further defense of contributory negligence.

Thereupon the plaintiff introduced in evidence the depositions of Perry Roberts and James D. Coughran marked plaintiff's Exhibit "2." These depositions described the manner in which the accident occurred; the nature, extent and duration of the injury, and the medical treatments received as a result thereof, and the extent of the plaintiff's

property damage. That in the deposition of Perry Roberts he testified that he was driving a truck and trailer and was passing the automobile driven by the plaintiff herein when the Anthony car was in the act of passing the said truck and trailer; that when the Anthony car came abreast of the cab of his truck it swerved sharply to its right, colliding with the left front wheel of the truck; that the impact knocked the truck wheels to the right and caused Perry Roberts to steer his truck further to the right to avoid a more serious collision with the Anthony car; that the only time his truck moved to the right while passing the Coughran car was at the time of the collision between the truck and the Anthony car; that at no time did the truck swerve [fol. 34] to the left or toward the Anthony car. That in the deposition of James D. Coughran, the plaintiff, he testified that at the time of the accident the truck and trailer operated by Perry Roberts was passing his car; that the truck and trailer suddenly veered to the right causing the trailer to collide with the Coughran car and with a tree at the side of the road; that his injuries resulted from the collision. That at the time these depositions were read in evidence plaintiff's counsel stated to the court that they were read without any waiver by the plaintiff of his contention that the Superior Court judgment was res adjudicata but as additional evidence of the facts.

JAMES D. COUGHRAN, called as a witness on behalf of the plaintiff, having first been duly sworn, testified on direct examination as follows:

That he is the plaintiff in the aforesaid Superior Court action, and is the owner of a judgment in the amount of $5,092.55, together with interest at the rate of 7% per annum from October 30, 1934, to the date of judgment, together with costs in the amount of $66.43, obtained therein, which has never been assigned, transferred nor has it been satisfied in full or in part. Whereupon the plaintiff offered in evidence as plaintiff's Exhibit "4" the policy of automobile liability insurance which was attached to the defendant insurance company's answer, and in said Answer marked Exhibit "A" and by reference made a part thereof.

A photostatic copy of this exhibit is attached hereto as Exhibit "A." The portions of the above described policy, material here, are as follows:

[fol. 35] "Terms and Conditions Forming a Part of this Policy

"(1) Risks Not Assumed by This Company: The Company shall not be liable and no liability or obligation of any kind shall attach to the Company for losses or damage:

(B) Unless the said automobile is being operated by the assured, his paid driver, members of his immediate family, or persons acting under the direction of the assured;

(E) Caused while the said automobile is being operated by any person whatsoever either under the influence of liquor or drugs or violating any law or ordinance as to age or driving license.

(9) Misrepresentation or Fraud, or Default in Required Payments When Due, Voids the Policy.

(A) This entire policy shall be void if the assured or his agent has concealed or misrepresented in writing or otherwise any material fact or circumstance concerning this insurance or the subject thereof, or if the assured or his agent shall make any attempt to defraud the Company either before or after the loss."

The plaintiff rested.

[fol. 36] Thereupon, defendant, to maintain the issue*d* on its part, called as a witness HELEN B. ANTHONY, who, having been previously duly sworn, testified: that she was driving one Nancy Leidendeker to her Los Angeles home from the school which the witness was conducting at her home in Orange, California, whereupon the defendant introduced in evidence proof of loss dated June 18th, 1934, as defendant's Exhibit "B." This document was signed "R. O. Anthony by Helen B. Anthony," and it contains a statement that Helen B. Anthony was driving the automobile at the time the accident occurred. The exhibit is printed

on a form with the words, "Proof of Loss" in large letters at the top of the same. It is in part as follows:

"I hereby state that an accident occurred on the 16th day of June, 1934, and that said loss was occasioned as follows:

Describe the accident in detail:

Full name of assured: R. O. Anthony.
Full name of driver: Mrs. Anthony.
Age of driver: 48.
Relation of driver to assured: Wife."

The witness next identified her signature on a statement of June 19th, 1934. This statement was then introduced in evidence as defendant's Exhibit "C." This statement is written in longhand and signed by Helen B. Anthony. [fol. 37] In the document she states in substance that she was driving west in the north lane of traffic on Telegraph Road, which is a three-lane highway; that just ahead of her, traveling in the same direction was a truck and trailer, and ahead of the truck and trailer was a Ford touring car; that another car was approaching from the west going east in the south lane of traffic; that she sounded her horn and started to pass the truck and when she was about even with the front end of the truck, the driver of the truck suddenly swerved toward her and that after she saw the truck turn toward her, she stepped on the gas and tried to get by, but the car and the truck collided. She further stated therein that she was accompanied at the time of the accident by Nancy Leidendeker, age, 13.

The witness next testified that on or about the 6th day of October, 1934, she appeared at the office of Joseph A. Spray, Esq., and went over the facts and details of her case with Attorney Spray prior to the taking of her deposition by the attorney for the plaintiff, Raymond G. Staubury. Said deposition was thereafter taken.

Helen B. Anthony stated that she was driving the car at the time of the accident and that she did not tell Mr. Spray where Nancy was in the car at that time, because Mr. Spray did not ask her, and that she did not tell Mr. Spray anything about Nancy having been behind the wheel or that Nancy had taken the wheel at Fullerton, California.

This conversation was objected to by counsel for plaintiff on the ground that it was incompetent and immaterial,

and that no foundation had been laid to attribute anything [fol. 38] said by Mrs. Anthony to the assured, Mr. Anthony, which would affect the policy. But the court overruled the objection, to which ruling plaintiff, by his counsel, then and there excepted.

Thereupon the defendant introduced in evidence the deposition of Helen B. Anthony as defendant's Exhibit "D" which said deposition was taken by attorney for plaintiff on October 6th, 1934, and in which deposition Mrs. Anthony stated in substance and effect as follows: That she, Mrs. Anthony, at the time of the accident, was driving a Ford Tudor automobile which belonged to her husband; that Nancy Leidendeker, a girl in her school, was with her in the car; that she was driving west along Telegraph Road at about thirty miles an hour and that she speeded up to around thirty-five to forty miles per hour to pass a truck and trailer which was proceeding in the same direction as she was; that before she started to pass the truck and trailer, she was driving immediately behind it and sounded her horn before starting to pass; that she did not turn her car to the north, or to her right, at any time before the collision with the truck, but that the truck driver turned his truck to the south, or to his left, and that this action on the part of the truck driver caused the collision; that after the impact she put on her brakes and drove her car over on to the dirt shoulder on the north side of the road and brought her car to a stop.

The introduction of this deposition was objected to by counsel for plaintiff on the ground that it was incompetent and that no foundation had been laid, and upon the further ground that it was immaterial and that there was no showing of agency or any complicity on the part of the assured, [fol. 39] R. O. Anthony, if there is any fraud or non-disclosure in that deposition, but the court overruled the objection to which ruling plaintiff, by his counsel, then and there excepted.

Helen B. Anthony testified that she came to the office of Joseph A. Spray, Esq., on the morning of the trial of the Superior Court action, October 29, 1934, and that Mr. Anthony accompanied her. The witness was asked what Mr. Spray told her and her husband, Mr. Anthony, during their conversation of that morning in Joseph A. Spray's office. This was objected to by counsel for plaintiff on the ground that it was incompetent and that no foundation

had been laid, but the court overruled the objection, to which ruling plaintiff, by his counsel, then and there excepted. The witness then stated that Mr. Spray had told her that Nancy Leidendeker had said that she was driving the car, to which the witness replied that she knew that Nancy had not said that and that she, the witness, would have to talk with Nancy Leidendeker before she would make any statement, and that because the trial of the Superior Court case was to start in approximately twenty minutes hence, she would not be able to talk to Nancy before the trial; that when she later talked to Nancy, Nancy told her that she had not stated to Mr. Spray that she was driving or that she was sitting in the driver's seat. The witness testified that Mr. Spray told her that on the night previous, Mr. Spray had gone out to see Nancy, and that Nancy told him that she was driving the car at the time of the accident, and the witness further stated that until she had talked with Nancy, she could not believe that Nancy had told Mr. Spray that she, Nancy, was driving [fol. 40] the car when the accident happened, and that Mr. Spray further stated to her that he would not defend the action unless the witness and her husband consented to sign the non-waiver agreement. The witness stated that she thought Mr. Spray had told her that Nancy had informed him that she had taken the steering wheel of the automobile at Fullerton, California, and had driven it from Fullerton, California, up to the time of the accident. Helen B. Anthony stated she did not remember that she told Mr. Spray that Nancy had never driven the car. This was objected to by counsel for plaintiff, on the ground that said question was incompetent, leading, suggestive and called for hearsay so far as the plaintiff is concerned, and upon the further ground that no foundation had been laid, but the court overruled said objection, to which ruling counsel for plaintiff then and there excepted.

Mrs. Anthony testified that Mr. Spray told her that Nancy had said to him that she took the steering wheel and got behind the wheel at Fullerton, California, but the witness denied that she stated to Mr. Spray that Nancy did not get behind the steering wheel at Fullerton, California. The witness denied that she stated to Mr. Spray that the only reason that she could understand why Nancy might make such a statement was to the effect that she, the witness, had been rather severe on Nancy at the wit-

ness' school which Nancy was attending, but the witness stated that she informed Mr. Spray that Mr. Anthony had been severe with Nancy for driving Mr. Anthony's car and that Mr. Anthony had told her never to drive his car.

[fol. 41] In response to a question by Mr. Spray as to whether she had given Nancy Leidendeker any instructions as to what to say if anybody asked her who was driving the car, Helen B. Anthony stated that Nancy had said to her, "Well, you were driving the car, Mrs. Anthony," to which Helen B. Anthony responded, "Well, you were at the wheel. Who was driving the car?" and Nancy said, "The one who had hold of the wheel steering it was operating the car"; that this same conversation was repeated to the police officer following the accident. The witness could not remember whether she had told Nancy not to say anything about Nancy having been driving the car, but the witness stated that she did tell Nancy at the time of the accident, "If you tell your mother, she never would trust you with me again and, if Mr. Anthony knew it, I am afraid he would do some harm to you, because he was so harsh with you at the time you took his car out of the garage at school." She further stated that she did not tell Mr. Spray on the morning of the trial that Nancy Leidendeker had taken the wheel at Fullerton and driven the car up to the time just prior to the impact. She did not recall whether Mr. Spray had stated to her that if Nancy Leidendeker had been driving the car at the time of the accident that there would probably be no coverage under the policy. The witness denied that Mr. Spray stated to her "that the insurance would be void if what Nancy says about driving the car is true," and she denied that Mr. Spray told her that she would not be covered by insurance by reason of misrepresentations, fraud and other things, but did state that Mr. Spray said that Mr. Anthony would not be covered by the insurance because of said things.

[fol. 42] Helen B. Anthony further testified that on the early morning of the second day of the Superior Court trial she had a conversation with W. S. Ronk and Joseph A. Spray, Esq., in which she stated that she was going to tell just how the accident had happened. The witness was asked whether she stated in her deposition that she was driving the car. The witness replied, "Yes, I said

we were going—I did not say I. I said I honked the horn and I looked through the rear mirror and the rear window. I was careful not to commit perjury in that deposition and the next morning I told you what I had revealed to you about different facts in the case did not concern my deposition." She further testified that Mr. Spray further advised Helen B. Anthony in that conversation to secure a lawyer to represent her at the trial; that at this conference the non-waiver agreement was signed by R. O. Anthony and Helen B. Anthony, in the presence of Ethel M. Pepin who was taking down a stenographic report of this conversation.

Thereupon the defendant introduced in evidence a statement dated December 21, 1934, signed by Helen B. Anthony, marked defendant's Exhibit "E" which said statement was in substance and effect as follows: That we left the school at 1:30 and after we passed Fullerton, Nancy Leidendeker repeatedly urged me to allow her to drive the car; that because she was a clever driver, I allowed her to sit in the driver's seat behind the wheel; that we drove along about thirty miles per hour; that we came up to a truck traveling in the same direction; that I told Nancy Leidendeker, "Now let's go around the truck," and I took the wheel and put my foot on the accelerator; that Nancy [fol. 43] Leidendeker leaned over to the left so I could drive more easily; that I increased the speed to forty miles per hour to pass the truck; that from the time we started to pass the truck until the time we stopped, I had entire control of the operation of the car.

The introduction of this statement was objected to.

Thereupon the defendant introduced in evidence a notice dated October 29th, 1934, served on Raymond G. Stanbury, marked defendant's Exhibit "F," which was in substance and effect as follows:

A notice that the defendant State Farm Mutual Automobile Insurance Company was proceeding with the defense of the Superior Court action through counsel Joseph A. Spray, under a non-waiver or reservation of rights agreement.

She further testified that defendant's Exhibit "E," the letter dated December 21, 1934, and signed by Helen B. Anthony, was written in the office of Mr. Ronk, represent-

ing the defendant State Farm Mutual Automobile Insurance Company; that she came to his office in response to a letter from him, requesting that she give him complete details concerning the happening of the accident; that while in his office and in his presence she wrote the contents of said Exhibit "E"; that in this statement, prepared in the presence of Mr. Ronk, the witness told all about Nancy Leidendeker being at the wheel and the truth about the case as the witness had previously given it from the time of the second day of the trial. The witness stated that Mr. Ronk told her he wanted the truth and the whole truth and Mrs. Anthony stated that everything contained in [fol. 44] defendant's Exhibit "E" "is all the truth."

In response to a question as to why she did not tell Mr. Spray the truth when she first talked with him before the trial, Mrs. Anthony replied that she was afraid Mr. Anthony would harm Nancy if he knew that she had been driving the car. In response to a question by the court, Mrs. Anthony stated that in conversation she had with Attorney Spray before the trial of the Superior Court action opened she did not tell the truth concerning the location of the little girl in the car at the time of the accident. The witness continued that after the first session of court and before the second session, she had a conversation with Nancy Leidendeker; that it was after this conversation that she for the first time told the truth concerning the location of the little girl, Nancy Leidendeker, in the car at the time of the accident.

Thereupon the defendant introduced in evidence a letter dated December 18, 1934, from W. S. Ronk to Mrs. Helen B. Anthony, marked defendant's Exhibit "G," which said exhibit was a letter in substance and effect requesting Mrs. Anthony to write to W. S. Ronk, the claims adjuster for the defendant insurance company, as to what took place in the accident of June 16th, 1934, giving the approximate length of time that Nancy Leidendeker had been behind the wheel, and how she happened to be in the driver's position, and any other information that might be pertinent.

She further testified that immediately following the impact of the automobile, she, Helen B. Anthony, told Nancy to get over and sit where Mrs. Anthony had been sitting [fol. 45] and to let her, Helen B. Anthony, have the wheel. The witness testified that she said to Nancy, immediately after the accident, "If your mother knew I had allowed

you to drive the car she would never trust me with you again." The witness testified that she also told Nancy, "If you say that you were driving that car, these people may take all of our property and we will lose everything."

The witness testified that she had recalled having had a subsequent conversation with Mr. Ronk, in which Mr. Ronk advised her that the statements of other witnesses as to the manner in which the accident occurred differed materially from her statement.

On cross-examination by plaintiff's counsel, Helen B. Anthony testified as follows:

That she was steering the automobile at the time of the accident and that she had taken hold of the steering wheel when her car had begun to turn out to go around the truck of the San Pedro Commercial Company, which was in front of it and traveling in the same direction and with which it later collided; that at the time she took hold of the wheel she asked Nancy Leidendeker to move over so that she, Helen B. Anthony, would have control of the accelerator on the wheel; that at the time of the collision she was partly in the driver's seat and Nancy Leidendeker was trying to steer the car, but that she, Helen B. Anthony, was actually steering the same at the time of the collision with the truck. She further testified that Mr. Anthony was not present at the time of the accident, and that the first time she told Mr. [fol. 46] Anthony that Nancy Leidendeker was behind the driver's wheel was after the judgment had been rendered in the Superior Court action; that prior to that time she had always told Mr. Anthony that she, the witness, was driving the car; that at no time did Mr. Anthony request the witness to make any report of the accident to the defendant Insurance Company, either in his own behalf or in the witness's behalf. The witness testified, however, that she herself made the report and that she signed the report "R. O. Anthony, by Helen B. Anthony" at the request of a Mr. Regan, a neighbor insurance agent who wrote the policy. The witness denied that Mr. Anthony had ever asked her to sign his name, or authorized Mrs. Anthony to sign any papers in his behalf, but the witness thought that she was doing it right because Mr. Regan, the broker, said it would be all right. She further testified that on the day of the accident she made a report of the accident to the Hollywood Police Department, in which she stated

she was the driver of the car. The witness testified that she did not tell her husband about the happening of the accident until the evening following its occurrence; that Mr. Anthony in that conversation asked her whether there had been anyone hurt and the witness replied that there had been some people hurt. The witness testified that she told Mr. Anthony that she was going over to see Mr. Regan that evening and report the accident. The witness then testified that she went into a telephone booth and made a report and then the witness said to Mr. Anthony, "I just told Mr. Regan and Mr. Regan said he would have the Insurance Company representative come down and see us and he would take care of it, and that is all"; and that Mr. Anthony replied, "That is fine."

[fol. 47] NANCY LEIDENDEKER, called as a witness on behalf of defendant, having been first duly sworn, testified as follows:

On direct examination she stated that in June 1934 she was living at Mrs. Anthony's school in Orange, California; that on the day of the accident she left the school with Mrs. Anthony to go to the witness' home in Los Angeles; that at that time the witness was thirteen years old and weighed about 125 pounds; that Mrs. Anthony was driving when they started out and, as they proceeded toward Los Angeles, they exchanged their positions in the front seat of Mr. Anthony's car, placing Nancy Leidendeker behind the driver's wheel. This was objected to by counsel for plaintiff that the issue is res adjudicata, it being alleged in the complaint in the Superior Court action that Mrs. Anthony was the driver and the verdict having been rendered in that case in favor of the plaintiff, which objection the court overruled, to which ruling plaintiff, by his counsel, then and there excepted.

The witness stated that just outside of Fullerton, California, she asked Mrs. Anthony whether she could drive the car and having received a reply in the affirmative, they changed their respective seats and the witness, Nancy, got in the driver's seat and proceeded to drive the car. The witness then testified that as she drove along, Mrs. Anthony said that she (the witness) was a pretty good driver and she made no objections as to the manner in which the

witness was driving the car until they started to pass the [fol. 48] truck, at which time the truck started to change its course of direction and the witness first tried to slow down and then she went forward, and when they had proceeded about half way past the truck, Mrs. Anthony grabbed the wheel and turned the Anthony car sharply to the right, causing the car to strike the truck. The witness, Nancy, testified that at the point of impact she had her hands on the wheel, but that Mrs. Anthony also had her hands on the wheel; that Mrs. Anthony did not tell the witness at that time to take her hands off the wheel; that the witness had her foot on the accelerator. She further testified that immediately after the accident she had a conversation with Mrs. Anthony, in which conversation Mrs. Anthony told her to get over into the other seat so that no one would know that she, Nancy Leidendeker, had been driving, if anyone asked any questions; that witness thereupon traded seats with Mrs. Anthony; that Mrs. Anthony also stated at that time that both of their coats were somewhat the same color, so that nobody would know the difference, and that if the witness told anyone that she had been driving, then Mrs. Anthony would have to pay a fine of $200.00.

Nancy Leidendeker further testified that she had a conversation with Mr. Anthony and Mrs. Anthony at about 5:00 o'clock on the evening of October 29, 1934, following the first day of the Superior Court trial; that in this conversation Mrs. Anthony told the witness that she, Nancy Leidendeker, must have been mistaken when she believed that she was driving the car, as she had never driven the car; that the witness stated that she had been driving and that she had told Mr. Spray that she had been driving; [fol. 49] that Mrs. Anthony further stated to the witness at that time that she would lose her property, all her money and home and everything if Nancy so testified in court and that Mrs. Anthony's daughter would have to go to work and quit school. The witness stated that she told Mrs. Anthony that she would not change her story and would not lie in court; and that Mr. Anthony did not say anything in the conversation. The witness testified that it was just a second prior to the impact when Mrs. Anthony grabbed the steering wheel for the first time.

On cross-examination Nancy Leidendeker testified that it was Mrs. Anthony who turned the Anthony car to the right at the time of the collision with the truck; that the witness had her hands on the wheel, but she was not steering it; that Mrs. Anthony steered the car into the truck; that when Mrs. Anthony took the wheel she moved over a little bit toward the witness' seat, but not very far. She stated that she, Nancy Leidendeker, had her foot on the accelerator pedal, with the same pressure on the accelerator pedal at the time of the impact as when Mrs. Anthony grabbed the wheel; that she did not know whether Mrs. Anthony had both hands on the wheel or not, and that the witness' hands were at the bottom of the wheel.

The witness, on redirect examination, testified that after the impact she had her foot on the brake pedal and both her [fol. 50] hands on the wheel and that she applied the brakes and brought the car to a stop; that the emergency brake which is situated in the center of the driver's compartment was not used either by the witness or by Mrs. Anthony. The witness also testified that Mrs. Anthony wanted her to go on after the accident, but she saw in the rear vision mirror that the Coughran car had had an accident with the truck and she insisted on stopping, because she thought someone was hurt.

It was stipulated that Nancy Leidendeker at the time of the accident did not have any license to drive an automobile in the State of California.

Ethel M. Pepin, called as a witness, on behalf of the defendant, having been first duly sworn, testified as follows:

On direct examination she stated she was a shorthand reporter and on the morning of October 29, 1934, she had taken down in shorthand and later transcribed a conversation between Mr. and Mrs. Anthony and Mr. Spray. The witness then read the conversation verbatim as given by the parties present on that morning, which conversation is substantially as follows:

Mr. Spray stated that he had talked with Nancy on the evening of October 28th, 1934, and had discovered that Nancy was driving the car when the accident happened. Mrs. Anthony denied that Nancy was driving, but stated

that Nancy took hold of the wheel for her while she was rolling up the window once coming into Los Angeles, and went into the driver's seat after the accident. Mrs. An- [fol. 51] thony stated that Nancy had not been behind the wheel at Fullerton and had never been allowed to drive the car before, and on the day of the accident she did not touch the wheel. Mr. Anthony stated that he had never given Nancy permission to drive the car, and that he had no knowledge that she had ever driven the car. Mrs. Anthony stated that immediately after the accident, she had no conversation with Nancy as to who was driving the car. Mr. Spray told Mrs. Anthony if what Nancy said was true, the insurance covering her car would be void because of the non-age of the driver, and by reason of misrepresentation and fraud. Then Mr. Spray stated that the insurance company would not represent her or Mr. Anthony unless they signed a non-waiver agreement, a form which was shown to both Mr. and Mrs. Anthony at the time. Mr. Spray also explained the force and effect of the non-waiver agreement, and he requested that they consult an attorney of their own selection, and have him present at the trial.

The introduction of the foregoing testimony of Ethel M. Pepin was objected to by counsel for plaintiff on the grounds that the entire conversation would be hearsay and incompetent, that no foundation was laid and that it would not tend to prove or disprove any issue in this case; that the matter was res adjudicata, that it constituted an attempt to impeach defendant's witness, Mrs. Anthony, which object was overruled by the court, to which ruling plaintiff by his counsel then and there excepted.

The witness, Ethel M. Pepin, after reading the foregoing transcript of the conversation, then related the substance [fol. 52] of a subsequent conversation she had with Mrs. Anthony, which conversation took place in the reception room of the law offices of Joseph A. Spray. She stated that the conversation was had about a week subsequent to Monday, October 29, 1934. The witness said that Mrs. Anthony in that conversation stated to her, in substance, that she wanted to apologize for the lies that she had told in the statement which the witness had taken down, and that she had already apologized to Mr. Spray and to Mr. Ronk and that she felt very badly about it and that she had not slept,

and that she particularly felt badly about it because she was the head of a girls' school.

W. S. Ronk, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

On direct examination he testified that he was in charge of the Claims Department for the State Farm Mutual Automobile Insurance Company and occupied that position at the time of the happening of the accident in question. He identified the statement given by Helen B. Anthony on December 21, 1934, defendant's Exhibit "E." He testified that on December 18th he had written a letter to Mrs. Anthony, wherein he had asked for additional information about the accident in question. The witness identified the defendant's Exhibit "G" as a copy of the letter, original of which he sent to Mrs. Anthony. The witness further stated that on the afternoon of July 15, 1934, he had a conversation with Mr. and Mrs. Anthony at their home in Orange County, California. He related this conversa-
[fol. 53] tion. This was objected to by counsel for plaintiff on the ground that the issue was res adjudicata and that it was incompetent. The court overruled the objection, to which ruling plaintiff, by his counsel, then *the* there excepted. The witness testified that in that conversation he discussed with Mrs. Anthony the relative positions and speeds of the various automobiles involved in the accident; and that there was no discussion as to the identity of the driver of the Anthony car. The witness stated that at that time he had no knowledge whatsoever that Nancy Leidendeker had been driving the car at the time of the accident; that he informed the Anthonys he had an appointment with the injured parties' representatives for the purpose of discussing the question of settlement. He further testified that had he known of Nancy Leidendeker's activities immediately preceding the happening of the accident, this fact would have influenced his conduct in the investigation and consideration of the settlement of the claims arising out of the accident; that if he had known a person under age had been driving the car, he would have secured instructions from his superiors in the insurance company as to the method of handling the claims and to determine whether protection would be given to the Anthony

car under the insurance policy; that in the event that protection would be given, he would have made every effort to make a settlement out of court; that in the event he had learned that two parties were operating the car at the time of the accident, he would have been influenced in his in-[fol. 54] vestigation and consideration of the settlement, as he would have sought legal advice as to the status of the driver, and if he had determined that the status was questionable, he would have made every effort to settle the case without litigation. He stated that it is the practice of his company to make every effort to obtain a reasonable settlement without litigation in cases where the investigation of the facts disclosed a probability or a strong possibility of liability.

On cross-examination W. S. Ronk testified that he knew Mr. Anthony was not present when the accident occurred; that he did not at any time seek any information from Mr. Anthony as to how the accident happened other than his conversation with Mr. and Mrs. Anthony on July 15th; that at no time did he ever ask Mr. Anthony for any information about the accident; that around July 18th, he made an offer of settlement to the injured parties and this offer was made with the belief that there was no question at all as to who was driving the car; that it was his understanding that after he received knowledge that Nancy Leidendeker was sitting in the driver's seat at the time of the accident that all offers that had been made previous to that time were considered withdrawn; that he had no knowledge of further discussion of settlement after he learned the truth.

[fol. 55] Whereupon the plaintiff, at the close of defendant's testimony, and defendant having rested, offered the following evidence in rebuttal:

Joseph A. Spray, called as a witness on behalf of plaintiff, having first been duly sworn, testified as follows:

On Direct examination the witness testified that ever since the inception of the aforementioned Superior Court case, he has been the attorney of record for the defendants and that a few days before the trial of said action the plaintiff's counsel, Mr. Stanbury, submitted a total figure of $3500.00

in settlement, to be paid from both defendants on some basis of contribution; that at about that itme he was trying to get the San Pedro Commercial Company, a co-defendant, to contribute toward the settlement but that they would offer only $250.00 and that he felt that they should contribute more. Mr. Spray also testified that in the negotiations prior to the trial he had made an offer of settlement on behalf of the defendants, Mr. and Mrs. Anthony, of approximately $3,000.00. The witness further testified that at the time the offer of $3,000.00 was made, he had had no conversation with Nancy Leidendeker and had no idea that she was sitting behind the steering wheel of the Anthony car at the time of the accident. The witness further stated that after he had discovered these facts he did not tell the plaintiff or his counsel that the defendant's offer of $3,000.00 was withdrawn. The witness further stated that at no time prior to the trial of the Superior Court action, or [fol. 56] during its progress, did he ever communicate to Mr. Stanbury or to the plaintiff any information that he had received from Nancy, or anyone else, as to there being some dispute as to who was driving the car. The witness testified that he served a copy of the written non-waiver agreement upon Mr. Stanbury before the jurors were called to the box on the first day of the trial; and that he did not tell Mr. Stanbury why the reservation of rights agreement was in existence until after the verdict in favor of the plaintiff and against the defendants. Mr. Spray testified that no request for continuance of the case was made.

On Cross-examination Joseph A. Spray stated that there were no further discussions of settlement up to the time of the entry of the verdict. He further testified that he depended upon the testimony of Mrs. Anthony in defending the Superior Court action; that he did not call Nancy Leidendeker as a witness because he did not want to impeach his own client; that he advised Mr. Stanbury about the grounds for defending under reservation of rights after the jury had returned a verdict in the case; that the verdict was $6500.00, which the court reduced to $5,000.00; that the case could have been settled prior to the selection of the jury for $3500.00. He testified that he continued to try the case after he learned that Nancy Leidendeker had some control over the car at the time of the accident. Asked by the court whether, as a lawyer, he knew that if it appeared

that this girl was driving the car, that it would have been difficult to convince either the court or the jury, and especi-
[fol. 57] ally the jury, that the defendant was not liable, Mr. Spray stated that he did realize that and that he felt that it would be suicide to the defendant's case, and that he did not call Mrs. Anthony as a witness in said action because he felt that she might be committing perjury, as he did not believe her himself; that he did not accept the offer of $3,500.00 in settlement because he felt that if the girl was driving the car, there would be no liability at all on the part of the Company. That in the trial of the action, he was representing both Mrs. Anthony and the Insurance Company; that at the time the action went to trial he believed that Mrs. Anthony, if called to the witness stand, would have testified in accordance with her deposition that she was driving the car; that on the basis of facts as shown by Mrs. Anthony's statement as to how the accident occurred, in his opinion there was a good and valid defense to the claim on its merits.

Raymond G. Stanbury, called as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

On direct examination the witness testified that he was the attorney for the plaintiff in the Superior Court case of Coughran vs. Anthony, et al., and that prior to the time of that trial that he had never talked to Nancy or either of the Anthonys except on the occasion when Mrs. Anthony's deposition was taken. He stated that at no time prior to or during the time of the Superior Court case did he learn that Nancy was in the driver's seat of the car at the time
[fol. 58] of the accident, and that the first information he had that Nancy was in the driver's seat was when Mr. Spray told him after the verdict. The witness further testified that he had negotiations with Mr. Spray looking toward a settlement of the lawsuit before the trial, and that he finally wrote a letter to Mr. Spray demanding $4250.00 about two or three weeks before the trial, and that his final offer of settlement was $3500.00. The witness testified that Mr. Spray, on behalf of the State Farm Mutual Automobile Insurance Company, offered $3,000.00 and Attorney Cushman, on behalf of the other co-defendant, offered $250.00, and that was the way the matter of settlement stood on the morning of the trial.

R. O. ANTHONY, called as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

On direct examination he testified that he is the party named as the assured in the policy of insurance in evidence, and that he was a defendant in the case of Coughran vs. Anthony, et al., in the Superior Court action; that he was not present when the accident happened; that the first knowledge he had of it was on the night following the day of the happening of the accident; that he heard nothing about the facts of the case until many months after the said date; and the first time he ever heard anything about the contention that Nancy Leidendeker was driving the car at the time of the accident was on the morning before trial in Mr. Spray's office at a conference at which Mr. Ronk was present; that the conversation that occurred there was the one [fol. 59] that was read into evidence by Miss Ethel M. Pepin; that up to that time he had never heard from any person that anyone other than Mrs. Anthony had anything to do with the management or operation of the car; that on the evening of the conference he went with Mrs. Anthony to Nancy Leidendeker's home; and that Mrs. Anthony there maintained that she was driving the car and that Nancy Leidendeker was false in stating that she, Nancy Leidendeker, was the driver. The witness further stated that on the day after the trial, Mrs. Anthony came to him (her husband) and stated that what she had previously told the witness in regard to her driving was false; that she said that Nancy was right and she asked the witness' forgiveness for misstating said matters to him.

Mr. Anthony testified that on the day following the accident, Mrs. Anthony reported to him that the accident was very slight; that he had never asked Mrs. Anthony to report this accident to the Insurance Company, nor did he request Mrs. Anthony to sign any papers for the insurance company; that he never had any conversation with Mrs. Anthony wherein he gave her authority to sign any papers for the insurance company, signing his name and her name under his.

On cross-examination, R. O. Anthony stated that he knew his insurance policy provided that he should notify the insurance company in event of an accident; that he knew that Mrs. Anthony had talked to Mr. Regan, the insur- [fol. 60] ance man, in regard to the accident; that he knew

some kind of a report had been made to Mr. Ronk concerning the accident and that Mrs. Anthony had given the information contained therein. Mr. Anthony further stated he did not see his automobile until the second morning following the accident; that while looking at the car Mrs. Anthony was present and told him some of the details concerning the happening of the accident; that she stated at that time that Nancy was with her when the accident happened; that he and Nancy had had some trouble previously about her driving his car and he had given instructions to her that she was not to take the car out; that the only knowledge he had about the facts surrounding the happening of the accident were those given to him by Mrs. Anthony, until he talked to Mr. Ronk; that he told Mr. Ronk everything that he knew concerning the accident.

Plaintiff rested.

FINDINGS AND CONCLUSIONS

Thereafter, the court pronounced the following findings and conclusions from the bench, to-wit:

"The Court: I think the court will indicate its findings now. The finding on the facts will be that facts are found substantially as alleged in the complaint. Upon these special defenses set up in the amended answer, the court finds that the defendant managed and conducted the defense of an action in the state court, in so far as any effect of its conduct operates against the plaintiff in this case, but also finds that there was executed just prior to the commencement of the trial of the state court action this instrument that has been received in evidence and denominated a non-waiver agreement; that the plaintiff in this case was not a [fol. 61] party to that agreement, had no knowledge of it or of any of the matters contained therein or adverted to thereby, and was not in privity with any of the defendants in the state court action; that the court finds from the evidence that the Chevrolet automobile was being jointly operated at the moment of accident—at the time of impact that resulted in the injury to the plaintiff in this case by Helen B. Anthony and the girl, at that time who was a minor and not permitted under the applicable laws to operate a

motor vehicle in the State of California; that as far as the propulsion or driving of the vehicle was concerned, other than the means of direction, all instrumentalities were being physically actuated by the minor; that the assured had forbidden the minor to drive any motor vehicle or automobiles of which he was the owner or in control, and that her actions on the day of the accident and at the time of the impact were in disobedience of that command and were performed in disobedience of the command by this girl Nancy——

Mr. Spray: Leidendeker, your Honor.

The Court: Yes. —with the acquiescence and knowledge of Helen B. Anthony and without any knowledge, acquiescence or consent on the part of the insured, R. O. Anthony, but in express disobedience of his previous instructions and requirements; that Helen B. Anthony and the assured, R. O. Anthony, were jointly engaged in the conduct of a business described in the evidence as a school, the minor, Nancy Leidendeker, being a pupil in that school; that her home was [fol. 62] in Los Angeles, but this school was some distance from that place, and that on the day of the accident she was being accompanied to her home in the automobile of the assured by Helen B. Anthony, but, that in other respects, and particularly with respect to the matter of giving notice within the terms of the policy in action, she was not the agent of R. O. Anthony; that the accident happened in the early afternoon of June 16, 1934, and that R. O. Anthony had no knowledge, information or intimation of any kind of the accident until the morning of June 18, 1934, when his wife, Helen B. Anthony, informed him substantially that she had an accident of minor importance; that she failed at that time to impart to him and concealed from him the true condition as it was known to her at that time; that the only additional information that he had was an inspection of the automobile that is the subject of the policy of insurance in action, and that the visible marks upon that automobile at that time conveyed no further or other or different information to him than was imparted by his wife, Helen B. Anthony; that the marks upon the automobile were indentations on the fenders of the left side of the automobile looking toward the front of the car and, in addition, minor breaking on the running board between the two fenders; that otherwise no visible marks were appa-

rent or disclosed to him. That both the assured, R. O. Anthony, and his wife, Mrs. Helen B. Anthony, had insurance policies with this company, and that each had their separate cars or automobiles; that they interchanged automobiles respectively during the time that they were con- [fol. 63] ducting this business together, and that the same agent of the defendant company attended to the business transactions and negotiated the respective contracts in the defendant company for both Mr. and Mrs. Anthony. That at no time did R. O. Anthony authorize, direct or instruct, or in any manner, expressly or impliedly, authorize, Mrs. Anthony to make any untrue statement to the defendant company or to any of its agents or employees; that the assured at all times fully and as far as he knew or had means of knowledge disclosed the truth concerning the accident that happened in which his automobile referred to in the contract in action participated, and that nothing that the assured did or said or authorized any other person to do or say misled or prejudiced the defendant company in any manner or particular, and that the false representations or concealment of Helen B. Anthony with respect to the accident, and, particularly, the identity of the driver or drivers or operator or operators, was in no manner participated in by the assured, but that Mrs. Helen B. Anthony did conceal from the defendant and from his agents and attorneys the facts relating to the accident, and, particularly, to the driver or drivers, operator or operators of the automobile at the time of the collision; that prior to the trial of the case in the state court, the defendant, through Joseph A. Spray, had knowledge of the concealment and falsification of Helen B. Anthony with respect to the accident and the driver or operator or drivers or operators of the Chrysler automobile at the time of the accident, and [fol. 64] that the non-waiver agreement hereinbefore mentioned was demanded and executed because of such ascertainment by the defendant and said Joseph A. Spray; that there was no prejudice resulting from any of the conduct herein found to have taken place, and that the facts alleged in the fourth separate defense in the amended answer, in so far as any connection or participation by the assured, R. O. Anthony, is concerned, have not been established; that the allegations of the fifth, sixth and seventh separate defenses set forth in the amended answer of the defendant

have not been sustained in so far as the assured, R. O. Anthony, is concerned, and that no act, conduct, transaction, concealment or fraudulent representation of Helen B. Anthony are attributable to the assured, R. O. Anthony. From these facts and because of the decision of the Appellate Court of the State of California in Lamb vs. Belt Casualty Company, et al., Third California Appellate (2d) 624, the court concludes that the implied findings of the state court in the tort action hereinbefore referred to operate to settle and fix the liability of the defendant in this case, and upon such grounds the court accordingly orders judgment for the plaintiff and against the defendant in the sum of $5,092.55 and costs of suit. Those findings and these conclusions constitute the findings and conclusions of the court, with such additional findings and conclusions as the court may hereafter detail. Now, I think they are complete, with the exception of those facts that have been stipulated to.

[fol. 65] Mr. Stanbury: Your Honor, did the court intentionally exclude interest on the Superior Court judgment?

The Court: No. It is an action ex contractu. I presume you would be entitled to it under the state law.

Mr. Stanbury: Yes, sir.

The Court: The interest will be included in the judgment.

Mr. McConnell: Will either counsel, your Honor, prepare findings?

The Court: I think they are complete now under the rule. I think we found on all of the issuable facts.

Mr. McConnell: I think so too.

The Court: If there is anything that you gentlemen have to suggest——

Mr. Stanbury: I have taken down what the court said verbatim, practically, in longhand and I would like to prepare them and you will have an opportunity to look them over and see if there is any omission.

Mr. McConnell: I am going to ask the reporter to furnish—and then there will be no variation—it might be that your Honor will wish to include that the policy—but that is in evidence—you don't need to specify the stipulation of the policy contract in the findings.

The Court: I think not. It is stipulated on that.

Mr. McConnell: I think they are complete, your Honor.

The Court: Off the record, gentlemen.

(Discussion off the record.)"

[fol. 66] Thereafter, to-wit, on the 23rd day of March, 1936, the Court signed additional findings and conclusions as follows, to-wit:

[The findings of fact, conclusions of law and judgment incorporated hereat are the same as signed, filed and entered as printed heretofore in the clerk's record:—Clerk.]

Forasmuch as the matters above set forth do not fully appear of record, defendant tenders this, his Bill of Exceptions, and prays that the same may be signed and approved by the Judge of this Honorable Court.

Dated June 8, 1936.

Joseph A. Spray, F. Britton McConnell, by F. Britton McConnell, Attorneys for Defendants.

[For Plaintiff's Exhibit #4 (the policy of Insurance incorporated and referred to herein) see Exhibit A, attached to defendant's amended answer.]

The foregoing Bill of Exceptions together with proposed amendments to Bill of Exceptions was filed on the 29 day of June, 1936, within the time allowed for filing the Bill of Exceptions on Order of the United States District Court for the Southern District of California, Central Division, dated June 29th, 1936, extending the time to June 29th, 1936, and made at the February term of said court.

[fol. 67] The inclusion of testimony in the exact words of the witness, Helen B. Anthony, so far as contained in the above Bill of Exceptions, is deemed necessary to a proper presentation to the appellate court of the questions involved in this appeal.

ORDERS SETTLING BILL OF EXCEPTIONS

Said bill together with said exceptions and amendments contains all the material facts given and proceedings had upon the trial of this action, and is in all respects correct, and is hereby approved and allowed and settled, and made a part of the record herein.

Dated June 29th, 1936.

Paul J. McCormick, United States District Judge for the Southern District of California, Central Division.

Service of a copy of the within Bill of Exceptions acknowledged this 12th day of June, 1936.

Parker & Stanbury, by Harry D. Parker, Attorneys for Plaintiff and Appellee.

[Endorsed]: Received copy of the within Bill of Exceptions this 12th day of June, 1936. Parker & Stanbury, by Harry D. Parker, attorneys for plaintiff and appellee. Lodged Jun. 8, 1936. R. S. Zimmerman, Clerk by Edmund L. Smith, Deputy Clerk.

[File endorsement omitted.]

[fol. 68] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO CORRECTNESS OF BILL OF EXCEPTIONS—Filed June 29, 1936

It is Hereby Stipulated by and between the attorneys for the respective parties hereto that the foregoing bill of exceptions, together with the proposed amendments to bill of exceptions, contain all the evidence given and proceedings had on the trial of this action, and that they are correct in all respects, and that they may be approved, allowed, settled and ordered filed and made a part of the record herein by the Honorable Paul J. McCormick, the judge who presided at the trial of said cause, upon the filing of this stipulation, without further or other notice to the parties hereto or their respective counsel.

Dated June 26, 1936.

Parker & Stanbury, by Raymond G. Stanbury, Attorneys for Plaintiff. Joseph A. Spray, F. Britton McConnell, by F. Britton McConnell, Attorneys for Defendant.

6/29/36.

It is so Ordered and defendant may withdraw the Proposed Bill of Exceptions for incorporating therein of amendments that have been agreed to herein and later file settled bill of exceptions.

Paul J. McCormick, Judge.

[File endorsement omitted.]

[fol. 69] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed June 8, 1936

To the Honorable Paul J. McCormick, Judge of the United States District Court:

Your petitioner, who is the defendant in the above entitled cause, prays that it may be permitted to take an appeal from the judgment entered in the above cause on the 23d day of March, 1936, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith; and your petitioner desires that said appeal shall operate as a supersedeas and therefore prays that an Order be made fixing the amount of security which the said defendant shall give and furnish upon such appeal, and that upon giving such security all further proceedings in this court be suspended and stayed until the determination of said appeal by the United States Circuit Court of Appeals.

Dated June 8, 1936.

Joseph A. Spray, F. Britton McConnell, by F. Britton McConnell, Attorneys for Defendant.

[fol. 70] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL, WITH SUPERSEDEAS

The petition of State Farm Mutual Automobile Insurance Company, a corporation, defendant in the above entitled cause, for an appeal from the final judgment is hereby granted and the appeal is allowed; and upon petitioner filing a bond in the amount of $11,000.00 with sufficient surety and conditioned as required by law, the same shall operate as supersedeas of the judgment made and entered in the above cause, and shall suspend and stay all further proceedings in this court until determination of said appeal by the United States Circuit Court of Appeals.

Paul J. McCormick, Judge of the United States District Court.

Dated June 9, 1936.

[File endorsement omitted.]

[fol. 71] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 8, 1936

Comes now the defendant, State Farm Mutual Automobile Insurance Company, a corporation, and having prayed for the allowance of its appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order, judgment and decree in the above entitled United States District Court, entered in said cause on the 23d day of March, 1936, and represents and shows that said order, judgment and decree are erroneous and unjust to this defendant and appellant in the following particulars, and presents and files the following as the Assignment of Errors upon which it will rely in the prosecution of said appeal, to-wit:

I

That the evidence shows without conflict that at the time of the accident the insured automobile was being driven by one Nancy Leidendeker, a minor of the age of 13 years, in violation of law as to age and driving license, [fol. 72] and that the policy of insurance upon which judgment was entered provided that the insurance did not extend to or cover, and that the company should have no liability for loss or damage caused while the said automobile was being driven by any person whatsoever violating any law or ordinance as to age or driving license.

That this unconflicting evidence required as a matter of law a finding that the loss upon which the cause of action was based was excluded from the coverage and insurance provided under the policy, and that the judgment be entered in favor of the defendant and appellant, and against the plaintiff and appellee.

II

That the evidence shows without conflict that the automobile insured under the policy in question was being operated by Helen B. Anthony in violation of law as to age and driving license of the driver of said automobile, and that the said automobile was then being driven with the consent and knowledge of the said Helen B. Anthony by one Nancy Leidendeker, a minor 13 years of age who

was then driving said automobile in violation of law as to age and driving license, and the policy of insurance upon which judgment was entered provided that the insurance did not cover or insure liability and that the insurer should not be liable for any loss or damage caused while the said automobile was being operated by any person whatsoever violating any law or ordinance as to age or driving license.

That this unconflicting evidence required as a matter of law a finding that the loss upon which the cause of action was based was excluded from the coverage and insurance provided under the policy, and that judgment be [fol. 73] entered in favor of the defendant and appellant, and against the plaintiff and appellee.

III

That the evidence shows without conflict that at the time of the accident the automobile insured under the policy was being driven or operated by one Nancy Leidendeker, a minor of the age of 13 years, and by Helen B. Anthony, an adult, who were then driving or operating said automobile in violation of the law as to age and driving license, and that the policy of insurance in question provided that the insurance should not cover or insure, and that the company should not be liable for any loss or obligation of any kind caused while the said automobile was being driven or operated by any person whatsoever violating any law or ordinance as to age or driving license.

That this unconflicting evidence required as a matter of law a finding that the loss upon which the cause of action was based was excluded from the coverage and insurance provided under the policy, and that judgment be entered in favor of the defendant and appellant, and against the plaintiff and appellee.

IV

That the court found in the findings of fact that the automobile insured under said insurance policy was being operated by a person violating the law of the State of California as to age and driving license, and under the terms of the insurance policy this fact constituted an exception to the coverage of the policy and a risk not

assumed by the insurer, but on the contrary expressly excluded from the coverage of the policy.

[fol. 74]

V

That the issues defined by the pleadings required a determination by the court upon the question of fact as to who was driving the insured automobile at the time of the accident, and the court erred in failing to make any finding upon this essential and material issue.

VI

That the evidence shows without conflict that the policy of insurance in question provided that the entire policy shall be void if the assured or his agent has concealed or misrepresented in writing or otherwise any material fact or circumstance concerning the insurance or the subject thereof, or if the assured or his agent shall make any attempt to defraud the company either before or after the loss. That the evidence shows without conflict that Helen B. Anthony was the agent of the assured, R. O. Anthony, and that said Helen B. Anthony concealed and misrepresented in writing and otherwise the material fact and circumstance and concerning the insurance and the subject thereof with respect to the identity of the driver of said automobile at the time of the accident in this: That said Helen B. Anthony represented in writing and otherwise, that she, Helen B. Anthony, was the driver and the sole and only driver and operator of the said automobile, which representation was false, in that the said automobile at the time of the accident was being driven in whole or in part by Nancy Leidendeker, an unlicensed minor of the age of 13 years, and said Helen B. Anthony concealed this material fact from the insurer and thereby attempted to defraud the company after the occurrence of the loss upon which the cause of action is based.

[fol. 75]

VII

That the court erred in finding that Helen B. Anthony was not the agent of R. O. Anthony with respect to the matter of giving notice to the insurer within the terms of the policy, notwithstanding that the evidence shows with-

out conflict that said Helen B. Anthony was the agent of said insured, R. O. Anthony, in operating the said automobile at the time of the accident in the absence of said R. O. Anthony, and in the matter of giving notice and a statement of the material facts and circumstances of the accident to the insurer as required by the terms of the policy.

VIII

That the court erred in this:

That, although the evidence shows without conflict, and the court found that there was a fraudulent concealment and misrepresentation on the part of Helen B. Anthony and that said Helen B. Anthony was the agent of the assured, R. O. Anthony, for the purpose of making a report of the accident to the insurer, (but not a false report), the court failed to take cognizance of the principle of law that the rights of the judgment creditor, the plaintiff herein, were precisely the same and no greater or less than would be the rights of the assured in asserting a claim under the policy of the insurance against the insurer, and that the effect of the judgment in favor of plaintiff was to allow the principle, R. O. Anthony and plaintiff herein, asserting his rights to benefit by reason of the concealments and misrepresentations practiced upon the insurer by said agent.

[fol. 76]

IX

That the court erred in this that the court found that Mrs. Helen B. Anthony had concealed from the defendant State Farm Mutual Automobile Insurance Company, a corporation, and from its agents and attorneys, the facts relating to the accident and particularly to the driver or drivers, operator or operators of the automobile at the time of the collision, and as the evidence shows without conflict that the policy of insurance provided that the policy shall be void if the assured or his agent has concealed any material fact or circumstance concerning the insurance or the subject thereof or shall make any attempt to defraud the company either before or after the loss, and as the evidence showed without conflict that said Helen B. Anthony was the agent of the assured, R. O. Anthony, with respect to said matters, the court as a matter of law should have entered judgment in favor of the defendant and appellant and against the plaintiff and appellee.

X

That the court erred in finding that prior to the commencement of the trial of the action in the State Court, in which James D. Coughran was plaintiff and R. O. Anthony and Helen B. Anthony were defendants, the defendant, State Farm Mutual Automobile Insurance Company, a corporation, had full knowledge of all the facts and circumstances concerning the presence of the said Nancy Leidendeker in the driver's seat or in a part of said seat, and all other facts related by the defendant as constituting con- [fol. 77] cealment and defense of the case at bar in that the evidence shows without conflict that prior to and throughout the first day of the trial of said action said Helen B. Anthony stated and represented to the defendant, State Farm Mutual Automobile Insurance Company, a corporation, that she, Helen B. Anthony, was the driver and the sole driver of said automobile at the time of the accident and that said Nancy Leidendeker was not in the driver's seat or in any part of said seat at the time of said accident.

XI

That the court erred in this: that the court found that the defendant, State Farm Mutual Automobile Insurance Company, a corporation, was bound by the judgment rendered against R. O. Anthony and Helen B. Anthony in the state court action irrespective of whether or not there was a breach of the terms and conditions of the insurance contract because of having *defendant* said action in the name of, and on behalf of the said R. O. Anthony and Helen B. Anthony and thereby failed to recognize and give effect to the terms, conditions, and legal effect of the non-waiver agreement entered into in writing between the said R. O. Anthony and Helen B. Anthony and defendant, State Farm Mutual Automobile Insurance Company, a corporation, prior to the commencement of the state court trial and to give effect to the stipulations and conditions of the contract of insurance between said parties.

[fol. 78]

XII

That the court erred in rendering judgment in favor of the plaintiff and appellee, and against the defendant and appellant, and the same is not supported by the evidence.

XIII

That the evidence does not support the findings of fact.

XIV

That the findings of fact do not support the judgment.

XV

That the findings of fact require as a matter of law that the judgment be entered in favor of the defendant and appellant and against plaintiff and appellee.

XVI

That the court erred in holding that the policy of insurance which was the subject matter of the action, insured liability arising out of the accident in question.

Wherefore, defendant prays that the said judgment may be reversed and for such other and further relief as to the court may seem just and proper.

Joseph A. Spray, F. Britton McConnell, by F. Britton McConnell.

[File endorsement omitted.]

[fols. 79-81] Cost bond on appeal for $250.00, approved and filed June 18, 1936, omitted in printing.

[fols. 82-84] Bond on stay for $11,000, approved and filed June 18, 1936, omitted in printing.

[fol. 85] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD AND STIPULATION RE DIMINUTION OF RECORD AND STIPULATION RE CORRECTNESS OF PRÆCIPE.—Filed July 27, 1936.

To the Clerk of Said Court:

SIR:

Please issue and prepare a Transcript of Record on Appeal to be filed in the United States Circuit Court of

Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above entitled cause and include therein the following:

Complaint and amended answer in action 7126-M, including Exhibit A thereto attached, said exhibit to be photostated;

Findings of Fact and Conclusions of Law, signed by Paul J. McCormick, J., dated March 23rd, 1936;

Judgment signed by Paul J. McCormick, J., entered March 23, 1936;

Petition for Appeal and Order Allowing Appeal;

Order, Allowing Appeal, with supersedeas;

Bond;

Citation on appeal;

Assignment of Errors;

Bill of Exceptions (omitting therefrom Exhibit #4 (the policy of insurance) which said exhibit is the same as Exhibit A, attached to defendant's amended answer);

Stipulation as to Correctness of Bill of Exceptions;

This Praecipe and Service thereon.

It is hereby stipulated and agreed, by and between the respective parties hereto by their respective counsel, that [fol. 86] the transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to the appeal heretofore allowed herein, shall include the foregoing specified items; and it is stipulated that the foregoing constitutes a complete and correct Praecipe of all items for the transcript of record.

It is further stipulated, between the respective parties by their attorneys, that in printing the record in the above entitled cause the Clerk shall omit from all the documents listed in the foregoing Praecipe and all papers and pleadings filed, all captions and headings of said papers or pleadings and substitute in the place of the same the phrase "Title of court and cause." The Clerk shall further omit all endorsements on the reverse sides of said papers except endorsements showing acknowledgment of services and filing endorsements of the Clerk of the Court.

Dated July 24th, 1936.

Joseph A. Spray and F. Britton McConnell by F. Britton McConnell, Attorneys for Appellant.
Parker & Stansbury, by Raymond G. Stanbury, Attorneys for Appellee.

Service of the within Praecipé accepted and acknowledged this 24 day of — 1936.

Raymond G. Stanbury, Attorneys for Appellees.

[File endorsement omitted.]

[fols. 87-90] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 91] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Before Wilbur and Garrecht, Circuit Judges; Neterer, District Judge

ORDER OF SUBMISSION.—February 26, 1937

Ordered appeal in above cause argued by Mr. F. Britton McConnell, counsel for appellant, and by Mr. Raymond G. Stanbury, counsel for appellee, and submitted to the court for consideration and decision.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

ORDER DIRECTING FILING OF OPINION AND DISSENTING OPINION AND FILING AND RECORDING OF JUDGMENT.—July 26, 1937

By direction of the Court, ordered that the typewritten opinion and dissenting opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and a judgment be filed and recorded in the minutes of this [fol. 92] court in accordance with the majority opinion rendered.

IN UNITED STATES CIRCUIT COURT OF APPEALS.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Before Wilbur and Garrecht, Circuit Judges, and Neterer, District Judge.

Opinion filed July 26, 1937

NETERER, District Judge:

Appellee having been injured in an automobile collision (automobile will be termed car herein) brought suit against R. O. Anthony and Helen B. Anthony charging negligence in driving of the car to Helen B. Anthony, wife of the registered owner. R. O. Anthony carried automobile insurance against such casualties in the appellant company. The appellant company, upon being advised of the accident, appeared under a non-waiver agreement. Judgment was recovered by appellee against R. O. Anthony and Helen B. Anthony for $5,000.00, it not being paid execution was issued and returned unsatisfied. Suit was then prosecuted against the appellant insurance company and a trial by jury was waived, and the court after hearing the evidence and argument of the lawyers made and filed findings of fact and conclusions of law and entered judgment in favor [fol. 93] of the appellee, to reverse which this appeal is prosecuted.

The court's attention is challenged to 16 errors; all errors may be classified in a group of four.

First, is the judgment in the State res judicata?

Second, does the evidence support the findings of fact?

Third, do the findings of fact support the judgment?

Fourt-, do the findings require that judgment be entered in favor of defendant (appellant)?

As will subsequently appear, it is obvious that it is unnecessary to decide the first point in view of our conclusion with relation to the other points.

All errors are therefore comprehended within the groups denominated second, third and fourth and will be considered together.

The trial court in Finding III found:

"That on or about the 16th day of June, 1934, and while said policy was in full force and effect, one Helen B. Anth-

ony operated the Chevrolet automobile referred to in and covered by said policy of insurance, with the permission and consent of the assured, R. O. Anthony, and operated the same negligently so as to proximately cause an accident and injury to the person and property of the plaintiff, to his damage * * *."

and in Finding XII found:

"With regard to the second, separate defense of defendant, the court finds that the said automobile at the time [fol. 94] of the impact that resulted in the injury to the plaintiff was being jointly operated by Helen B. Anthony and Nancy Leidenacker * * *; that said Nancy Leidenacker was a minor * * *; that the assured had forbidden said minor, Nancy Leidenacker, to drive any motor vehicle or automobile of which he was the owner or which he controlled; and that the action of said Nancy Leidenacker on the day of the accident and at the time of the impact involved in this action were in disobedience of and contrary to the commands, orders and instructions of the assured, R. O. Anthony; that at the time of the accident, insofar as the propulsion of the vehicle was concerned, other than the means of direction, all instrumentalities of said automobile were being physically actuated by said minor, Nancy Leidenacker, with the acquiescence and knowledge of Helen B. Anthony and without any knowledge, acquiescence or consent on the part of the assured, R. O. Anthony; that the proximate and direct cause of the collision between the insured automobile and a truck * * * was the act of Helen B. Anthony in seizing the steering wheel of the automobile at and immediately preceding the moment of impact and collision."

The court found other findings.

"From the foregoing facts the court concludes as a matter of law that the plaintiff is entitled to have and recover [fol. 95] of the defendant herein judgment * * *."

This court is bound by the facts found by the trial judge, 28 U. S. C. A. §875. In finding III Helen B. Anthony operated the car negligently so as to proximately cause the accident, and injury to persons and property, and in finding XII that "* * * the said automobile at the time of the

impact that resulted in the injury to the plaintiff, was being jointly operated by Helen B. Anthony and Nancy Leidenacker * * *." This finding that the car was "jointly operated by Helen B. Anthony and the passenger minor is inconsistent with finding III that Helen B. Anthony operated the car. And to elucidate the truth, a review of the testimony is required. Justice requires as much. Neither party asked for a more specific finding.

The record, undisputed, discloses that Helen B. Anthony was custodian of the car in issue at the beginning of the drive in question, selected the course and was behind the wheel and directed its movement and carried the minor as a passenger from school to her home; and when on the course the thirteen year old minor passenger, weighing 125 pounds, mentally and physically fit, "a clever driver" requested permission to drive, was permitted to sit behind the wheel, took charge of the operating mechanism of the car, and Mrs. Anthony sat on the seat beside her and the only remark in evidence was, "you are a good driver," until the truck was overtaken and Mrs. Anthony told the [fol. 96] minor to pass the truck and to increase the speed from 30 to 40 miles per hour. This remark shows that Mrs. Anthony used the passenger minor as her instrument in driving and the remark approves the course and speed, and that she was director of the trip, the driver of the car; that she was "master of the ship". Grant v. Knepper, 245 N. Y. 158 (156 N. E. 650). How far the car had travelled after the minor passenger sat behind, and took hold of the wheel, before Mrs. Anthony directed passing the truck and increasing the speed from 30 to 40 miles per hour and took the wheel and changed the course of the car and collided with the truck is not shown. After the accident Helen B. Anthony again took the wheel. It is obvious that the driving and operating at no time was changed from Helen B. Anthony during the entire trip. To operate a car may be said to include driving, and which means selection of a course and series of acts to effect a purpose in moving the car, and as said in Miller v. Minn. & N. W. Ry. Co., 76 Iowa 765 (30 N. W. 188), a right to control the movement; including the control of intermediate stops along the highway and of the car at rest and the speed. All these functions rested upon and were exercised by the licensed operator, Mrs. Anthony. The licensed operator of the car was

in control and did personally direct the car movement and did physically change the course of the car and ran it into the truck. This was the sole and proximate cause of the [fol. 97] accident and without which the accident would not have occurred. The conclusion in finding XII that the passenger minor was a joint driver is not sustained, and has no weight as against finding III, a finding of positive ultimate fact that Helen B. Anthony was the driver of the car, O'Connell v. N. J. Fidelity Etc. Co., 139 N. E. 744.

A person may be operator or driver of the car even though not personally in charge of the mechanical operating device.

"The clear implication is that, if the legal user at the time be present in the car, still 'the director of the enterprise', still 'the master of the ship', the operation of the car is his operation, though the hands at the wheel are those of a substitute." Arcara v. Moresse, 179 N. E. 389.

This is not new doctrine, but comes from horse and cart days, when Lord Abinger (1835) in the case of Booth v. Mister, English Report (full reprint) Vol. 173, Nisi Prius Book 4, p. 30, Vol. 7 C. & P. 66, where defendant was sued for negligent driving of his cart by his servant who struck against a cabriolet in which plaintiff was riding and was injured, said in substance: The substitute who held the reins was the mere instrument of the driver, who sat beside him on the box.

The passenger minor was the mere instrument of the driver, Mrs. Anthony, in driving the car while sitting behind the wheel.

Exemptions claimed in the policy are: (d) "Unless the said automobile is being operated by the assured, his paid [fol. 98] driver, members of his immediate family, or persons acting under the direction of the assured;" and (e) "Caused while the said automobile is being driven or operated by any person whatsoever either under the influence of liquor or drugs or violating any law or ordinance as to age or driving license."; and another under "Misrepresentation", (a) "This entire policy shall be void if the assured or his agent has concealed or misrepresented in writing or otherwise any *material fact* or circumstance concerning this insurance or the subject thereof, or if the assured or his agent shall make any attempt to defraud the

company either before or after the loss." (Italics supplied).

The car "was insured against legal liability imposed upon the assured resulting solely and directly by an accident by reason of ownership, maintenance or use of the automobile" subject to exceptions above noted.

Section 58a California Vehicle Act (Stat. 1927, p. 1427) makes it unlawful for any person to operate automobiles unless licensed as an operator, and Section 64a, Act supra, (Stat. 1931, p. 2108) provides an operator's license shall not be issued to any person under 16 (with some exceptions not important here). Section 18, Act supra, (Stat. 1923, p. 518) defines an operator as "every person who drives, operates or is in *actual physical control* of a motor vehicle upon a public highway." (Italics supplied). Section 76 of the California Vehicle Code, Act supra, makes [fol. 99] it an offense for the operator of a car to permit a minor to drive the same.

The sections of the Statutes referred to have no operative effect since the car was operated by Helen B. Anthony within the purview of the insurance policy and the State law. She was a licensed operator and a member of the insured's family.

The court found that R. O. Anthony had forbidden the minor from driving said car and whatever she did was "in disobedience of and contrary to the commands, orders and instructions of the assured, R. O. Anthony * * *." That the proximate cause of the collision was the act of Helen B. Anthony in seizing the steering wheel and turning the car to the right, causing the collision with the truck.

These exemptions, however, by the interchangeable use of the words "operated" and "driven", which we believe mean actual control, create possibly two viewpoints of approach or interpretation, and as stated by both parties in their briefs, "*the question presented was a simple matter of interpretation of contract.*" (Italics supplied.) In such event the interpretation most liberal in favor of the assured and strict against the insurer must be followed. Pacific Heating Etc. Co. v. Williamsburgh Etc. Ins. Co., 158 Cal. 367. In Thames & Mersey M. Ins. Co. v. Pacific Creosoting Co., 223 F. 561 at 567 (9 C. C. A.) the court said:

"It is a fundamental rule in the law of insurance that a stipulation in a policy which is in the nature of an exception

[fol. 100] to the liability of the insurer must be construed strictly against it, and that words of exception in a policy, if doubtful, are to be construed most strongly against the party for whose benefit they were intended."

The Supreme Court in Liverpool and London and Globe Ins. Co. v. Kearney, 180 U. S. 132, at 136, said:

"To the general rule there is an apparent exception in the case of contracts of insurance, namely, that where a policy of insurance is so framed as to leave room for two constructions, the words used should be interpreted most strongly against the insurer."

Both the insurance clause and the exemption clauses must be strictly construed against the insurer. In thus interpreting these exemptions it appears clear exemption (e) is controlled by exemption (d) as to operator of this car, and Mrs. Anthony was the operator and driver in fact within the express provisions of the policy. The utmost that may be said in appellant's behalf is that the minor was a joint operator and joint operator is not an exemption from liability.

An insurance policy having a clear and unequivocal guaranty against accidental loss will not be limited or controlled by later doubtful exemptions. In re Emily Pixley Shaw, 198 Cal. 352.

On the cooperative condition in the policy the court found:

[fol. 101] "* * * that all conditions precedent to be performed upon the part of the assured, R. O. Anthony, under the terms of said policy of insurance so far as they affect this plaintiff (appellee), were fully performed according to the terms of said policy * * *; that at no time did the assured, R. O. Anthony, authorize, direct or instruct, or in any manner, expressly or impliedly, authorize Helen B. Anthony to make any untrue statement or statements, or untrue or false representations to the defendant or its agent or employees. That the assured at all times fully and fairly, as far as he knew or had means of knowledge, disclosed the truth concerning the accident in question and that nothing said, done or authorized by the said assured, R. O. Anthony, misled or prejudiced the defendant company in any manner or particular. That no statements or

representations or concealments of Helen B. Anthony, with respect to the accident or the identity of the driver or operator, were in any manner participated in or ratified by the assured, R. O. Anthony * * *. That prior to the trial of the action in the State court herein referred to, the defendant (appellant), * * * had knowledge of the fact that another person, one Nancy Leidenacker, was also occupying the driver's seat of the insured automobile at the time of the accident and of all other facts and circumstances concerning the identity of the persons occupying said automobile and their positions therein, and all other [fol. 102] facts and circumstances regarding said accident. * * *. The court finds that no prejudice resulted to the defendant from any of the conduct herein found to have taken place by the said Helen B. Anthony * * *."

The court further found that it is not true that the assured failed to cooperate, as required by the terms of said policy of insurance, and make a fair and frank disclosure of the facts reasonably demanded to enable it to determine its defense in the State court action; and that the assured did not commit or attempt to commit any fraud upon the defendant (appellant) and that the assured did furnish to the defendant a true and fair statement of the circumstances as known to him and did at all times cooperate with the defendant (appellant). No findings were requested by appellant. The finding elucidated by the evidence does sustain the finding III as the ultimate fact as to operator of the car herein indicated (and finding XII alone shows operation of the car by Helen B. Anthony) and the general conclusion of law is sustained by the finding and all sustain the judgment.

Affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

DISSENTING OPINION—Filed July 26, 1937

WILBUR, Circuit Judge, dissenting:

The appellee, James D. Coughran was injured as a result of the operation of an automobile belonging to R. O. Anthony, to whom the appellant has issued a policy of insurance, which under the terms of the policy and under

the law of California gave a right to action thereon to a person so injured in the event the insured was bankrupt or insolvent. (Calif. Stats. 1919, ch. 367, p. 776.) This ac- [fol. 103] tion is of that nature. The appellant interposed several defenses: It denied that the appellee owned the judgment, and that the insured was insolvent. It alleged that the insured had not performed all the terms of the policy because at the time of the accident the automobile was not being operated by the insured or wife or by anyone with the consent and permission of the insured, and upon the further ground that the insured and his wife, Helen B. Anthony, had made false and fraudulent representations to the appellant as to who was driving and operating the car at the time of the accident, and that the insured and Helen B. Anthony failed to cooperate with the appellant in the defense of this action, as required by the policy. In a second separate defense it was alleged that the automobile at the time of the accident was being driven and operated by a person in violation of the law of the state of California as to age and driver's license, and that the driver of the car was a female minor, age 13 years. In a third defense appellant alleged the failure of the insured and Helen B. Anthony to cooperate in the defense of the action brought against the insured. In a fourth defense appellant alleged misrepresentations made by the insured and Helen B. Anthony to the appellant as to who was driving the car at the time of the accident. In a fifth defense it was alleged that the defense of the action against the insured was undertaken solely under a non-waiver agreement, and that appellant had informed the insured that it was not liable [fol. 104] under the policy. In a sixth defense appellant alleged that the policy was void because the insured and Helen B. Anthony had concealed or misrepresented in writing material facts concerning the action, and in a seventh defense that under another provision of the policy they had failed to cooperate in the defense of the action brought against them by failing to furnish a true statement of the facts and circumstances surrounding the happening of the accident. The cause was tried before the court without a jury, the jury having been waived, and the court made its findings of fact and conclusions of law and rendered judgment in favor of the appellee and against appellant for the full amount of the claim ($5,082.55) with interest and

costs. No findings or conclusions of law were presented to the court for ruling thereon and no motion was made for judgment at the conclusion of the testimony. The appellant makes sixteen assignments of error. Several of these assignments are predicated upon the failure of the court to make certain findings (Assignments Nos. 1, 2, 3, 6, 7, 8, 9, 10 and 11). They present no question for review as findings were not presented to the trial court for ruling thereon. Assignments 12, 13 and 16 raise no questions for review. These assignments are either too general or are not based upon any ruling. They are as follows:

XII.

"That the court erred in rendering judgment in favor of the plaintiff and appellee, and against the defendant and appellant, and the same is not supported by the evidence.

[fol. 105] XIII

"That the evidence does not support the findings of fact. * * *

XVI.

"That the court erred in holding that the policy of insurance which was the subject matter of the action, insured liability arising out of the accident in question."

The only question presented by the record is whether or not the findings support the judgment. This is presented in various ways in the assignments of error. (Assignments Nos. 4, 5, 14 and 15). The principal contentions of the appellant revolve around the claim that at the time of the accident the machine was being driven and operated by a thirteen-year-old girl in violation of the terms of the policy and of the statutes of California. The insurance policy is made a part of the findings. Under the heading "Terms and Conditions Forming a Part of this Policy", and the sub-heading "(1) Risks Not Assumed by this Company", we have the following:

"The company shall not be liable and no liability or obligation of any kind shall attach to the company for losses or damage: (A) * * * (D) Unless the said automobile is being operated by the assured, his paid driver, members of his immediate family, or persons acting under the

direction of the assured; * * * (E) Caused while the said automobile is being operated by any person whatsoever [fol. 106] either under the influence of liquor or drugs, or violating any law or ordinance as to age or driving license. * * *".

The Motor Vehicle Act of California, (Stats. 1927, p. 1427, § 58(a)) in effect at the time of the accident, provided:

"It shall be unlawful for any person to drive a motor vehicle upon any public highway in this state, whether as an operator or a chauffeur, unless such person has been licensed as an operator or chauffeur."

The Motor Vehicle Act of California, (Stats. 1931, p. 2108, § 64(a), ch. 266) provided:

"An operator's license shall not be issued to any person under the age of 16 years * * *". [Except under circumstances not involved here].

The Motor Vehicle Act of California, (Stats. 1923, p. 536, § 76) provided:

"No person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be driven by any person who has no legal right to do so or in violation of the provisions of this Act."

Sections 1 and 18 of the California Motor Vehicle Act (Stats. 1923, p. 518) defined an operator within the meaning of the Act to be "Every person who drives, operates or is in actual physical control of a motor vehicle upon a public highway." It may be conceded that at the time of the accident the automobile of the insured was in charge of his wife, a member of his family, and consequently that he was insured against liability within the meaning of sub- [fol. 107] division (D) of the policy above quoted. This much is conceded by the appellant and it is clear that the adjudication in the tort action that Mrs. Helen B. Anthony was operating the car is binding upon the appellant. The difficulty arises by reason of provision (E) above quoted. The findings are not entirely consistent. The third finding is that the automobile was being operated by Helen B. Anthony so negligently as to proximately cause the acci-

dent. In dealing with the second defense, that the automobile was being driven by a thirteen-year-old girl, Nancy Leidendeker, the court found that the car at the time of the impact which resulted in the injury to the appellee was being jointly operated by Helen B. Anthony and Nancy Leidendeker. This is followed by a detailed statement as to how the car was being operated, namely:

"* * * that at the time of the accident, insofar as the propulsion of the vehicle was concerned, other than the means of direction, all instrumentalities of said automobile were being physically actuated by said minor Nancy Leidenacker, with the acquiescence and knowledge of Helen B. Anthony and without any knowledge, acquiescence or consent on the part of the assured, R. O. Anthony; that the proximate and direct cause of the collision between the insured automobile and a truck owned by San Pedro Commercial Company was the act of Helen B. Anthony in seizing the steering wheel of the automobile at and immediately preceding the moment of impact and collision."

[fol. 108] In view of the statutory definition of what constitutes an operator, namely, one in actual physical control of a motor vehicle, (Cal. Motor Vehicle Act, §§ 1, 18, supra), and in view of the purpose of the law to protect the public from the lack of judgment and skill of a young child, it seems clear that the child was driving the automobile in the case at bar within the meaning of that term as defined in the statutes of California and, consequently, was violating the law of California, and that the wife also who, in a legal sense had control of the car, was violating the statute by permitting the child to operate the car. Therefore, whether we consider the question from the standpoint of the action of the child or of the wife the car was operated in violation of law as to age and driving license. If it was operated in violation of such a law the policy expressly provides that there shall be no liability on the part of the Insurance Company. If we assume, as the court found, that the car was being jointly operated and that the child had control of some part of the driving mechanism, and the wife had control of another portion, it is still true that each was violating the provisions of the law—the child by driving the car and the wife by permitting her to do so.

Turning to the question of the effect in this action of the judgment in the tort action, wherein a judgment was se-

cured by the appellee against the insured R. O. Anthony and his wife, Helen B. Anthony, the judgment roll is not before us, hence, the effect of this judgment must be deter- [fol. 109] mined from the findings herein in relation thereto, namely, that the appellee brought an action against R. O. Anthony and Helen B. Anthony and that the defense of that action was conducted under a non-waiver agreement by the appellant; that the complaint in that action alleged that Helen B. Anthony was the driver of the automobile insured at the time of the accident, and that judgment was recovered against R. O. Anthony and Helen B. Anthony. Under the law of California a judgment secured against an insured in such an action is conclusive against the Insurance Company which has undertaken the defense of the action on behalf of the insured. (Parra v. Traeger, 6 P. 2d. 491; Cal. Div. Code § 2778). The judgment, therefore, is conclusive as to the amount of the damages suffered by the appellee, and as to the liability of R. O. Anthony and Helen B. Anthony (Lamb v. Belt Cas. Co., 3 Cal. App. 2d., 624, 40 P. (2d) 311).

The tort action brought by the injured person against the insured did not involve any defenses which the Insurance Company may have by reason of the terms of the policy (see, Bryson v. International Ind. Co., 88 Cal. App. 100). Although by the terms of the policy the Insurance Company was not liable if the car was being driven by a person who in so doing was violating the law, it could not litigate its exemption from liability under the policy in the tort action, because under the law of California an allegation by the defendants that the car was being driven by a thirteen-year-old child jointly with and with the consent [fol. 110] of Helen B. Anthony in violation of law, would constitute an admission of negligence by the defendant Helen B. Anthony. And it would have been no defense in the tort action for R. O. Anthony to have alleged that the car was jointly driven by Helen B. Anthony and the minor although if the car had been wholly operated by the thirteen-year-old minor in violation of his orders and instruction he would not have been personally liable. It follows that the question of whether or not the car was jointly driven by Mrs. Anthony and the child at the time of the accident was not involved in or litigated in the tort action. In that action it was alleged and the court found that the

car was being operated by Mrs. Anthony. There may be an element of inconsistency in saying that although the court, in the tort action, found that Mrs. Anthony was driving the car at the time of the accident, in this action the Insurance Company can rely upon the claim that the car was also driven by the thirteen-year-old girl. But inasmuch as the question of joint driving, insofar as it involved a defense of appellant under the policy would be entirely foreign to the tort action and could not properly be litigated therein and was not so litigated, the judgment in the tort action does not prevent the Insurance Company from advancing the defense it now interposes. (See Bryson v. International Ind. Co., supra; Rogers v. Detroit Automobile Inter-Ins. Exch., 266, supra; Rogers v. Detroit Automobile Inter-Ins. Exch., 266 N. W. 386 (Mich.); Baxter v. Central [fol. 111] West Cas. Co., 58 P. (2d) 835 (Wash.)).

I conclude that the finding that the car was jointly operated by Mrs. Anthony and the child is a conclusion of fact binding upon us and that this conclusion of fact does not support the conclusion of law as to liability on the part of the Insurance Company, nor support the judgment.

With reference to the defenses of concealment and misrepresentations and failure of cooperation, appellant's argument is that the wife in making the report of the accident and in making such representations as she made to the Insurance Company to the effect that she was driving the car was acting as agent of the husband in making such representations. It is sufficient to say that that question is foreclosed by the findings of the court on this question in favor of appellee. The finding that the person did not make representations is a finding that he did not make such representations through an agent.

The judgment should be reversed and the court should be directed to enter judgment on the findings in favor of the appellant.

[File endorsement omitted.]

[fol. 112] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 8330

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant,

vs.

JAMES D. COUGHRAN, Appellee

JUDGMENT—Filed July 26, 1937

Upon appeal from the District Court of the United States for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the appellee and against the appellant.

It is Further Ordered and Adjudged by this Court that the appellee recover against the appellant for his costs herein expended, and have execution therefor.

[File endorsement omitted.]

[fol. 113] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING ISSUANCE OF MANDATE—Filed August 20, 1937

Upon application of Joseph A. Spray, Esq., counsel for the appellant, and good cause therefor appearing, it is ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including October 1, 1937; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court

of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

William Denman, United States Circuit Judge.

Dated, San Francisco, California, August 20, 1937.

[File endorsement omitted.]

[fol. 114] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 115] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

ORDER STAYING ISSUANCE OF MANDATE—Filed September 28, 1937

Upon application of Mr. Joseph A. Spray, counsel for the appellant, and good cause therefor appearing, It is Ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including October 26, 1937; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

Curtis D. Wilbur, United States Circuit Judge.

Dated, San Francisco, California, September 28, 1937.

[File endorsement omitted.]

Clerk's certificate to foregoing paper omitted in printing.

[fol. 116] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 6, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 42,000. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 519. State Farm Mutual Automobile Insurance Company, petitioner, vs. James D. Coughran. Petition for a writ of certiorari and exhibit thereto. Filed October 20, 1937. Term No. 519, O. T., 1937.

FILE COPY

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CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1937.

No. 519

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation,

Petitioner,

vs.

JAMES D. COUGHRAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

SYDNEY L. GRAHAM,
Bloomington, Illinois,
Counsel for Petitioner.

JOSEPH A. SPRAY,
F. BRITTON MCCONNELL,
Roosevelt Bldg., 727 W. 7th St., Los Angeles,
Of Counsel.

Parker & Baird Company, Law Printers, Los Angeles.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1937.

No. .....

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation,

Petitioner,

vs.

JAMES D. COUGHRAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

State Farm Mutual Automobile Insurance Company, a corporation, petitioner, prays that a writ of certiorari issue to review the judgment entered July 26, 1937, in the United States Circuit Court of Appeals for the Ninth Circuit, in case No. 8330 entitled "State Farm Mutual Automobile Insurance Company, a corporation, Appellant, vs. James D. Coughran, Appellee."

Questions Presented.

[1.] When the trial court, sitting without a jury, has made a special finding of fact, may the Circuit Court of Appeals examine the bill of exceptions to determine whether or not, in the opinion of the Circuit Court of Appeals, the trial court was justified in making such finding of fact, and, upon reaching a contrary conclusion, disregard such finding?

[2.] When special findings of the trial court are contradictory and inconsistent, may the Circuit Court of Appeals go behind such findings and investigate the facts from the bill of exceptions and determine findings of fact of its own?

[3.] Where a contract of insurance is clear and unambiguous and separately states several "Risks Not Assumed by the Company", may the court ignore an exception separately stated and hold it to be qualified by another separately stated and independent exception?

Statement.

The basic facts upon which the questions arise are concisely stated in the majority opinion of the circuit Court of Appeals, which we adopt as follows:

> "Appellee having been injured in an automobile collision (automobile will be termed car herein) brought suit against R. O. Anthony and Helen B. Anthony charging negligence in driving of the car to Helen B. Anthony, wife of the registered owner. R. O. Anthony carried automobile insurance against such casualties in the appellant company. The appellant company, upon being advised of the accident, appeared under a non-waiver agreement. Judgment

was recovered by appellee against R. O. Anthony and Helen B. Anthony for $5,000.00, it not being paid execution was issued and returned unsatisfied. Suit was then prosecuted against the appellant insurance company and a trial by jury was waived, and the court after hearing the evidence and argument of the lawyers made and filed findings of fact and conclusions of law and entered judgment in favor of the appellee, to reverse which this appeal is prosecuted."

Two persons were in the insured automobile at the time of the accident, Helen B. Anthony, the wife of the assured, R. O. Anthony, an adult and licensed operator under the applicable California statutes, and Nancy Leidenacker, who was then 13 years of age and who was not and could not under the applicable laws have been licensed as an operator. For convenience we have italicized the pertinent provisions of the policy contract and of the findings of fact of the trial court hereinafter quoted.

The insurance policy involved was incorporated in the findings of the trial court. [Tr. of Record, opposite p. 16.] It provided that the company insured the policyholder in consideration of a stated premium and "subject to the terms and conditions of this policy" for a stated period of time which included the time of the automobile accident referred to. Under the heading "Terms and Conditions Forming a Part of This Policy" in bold face type, and the sub-heading also in bold face type, "Risks Not Assumed by This Company", the contract stated:

> *"The Company shall not be liable and no liability or obligation of any kind shall attach to the Company for losses or damage:* (A) To robes, wearing apparel or personal effects under Part I above; (B)

To any parts of the body, machinery and equipment of the automobile herein described while kept or stored separately or while not connected with said automobile; (C) Caused directly or indirectly by flood, invasion, insurrection, riot, civil war or commotion, military, naval or usurped power, or by order of any civil or military authority; (D) Unless the said automobile is being operated by the Assured, his paid driver, members of his immediate family, or persons acting under the direction of the Assured; (E) *Caused while the said automobile is being driven or operated by any person whatsoever either under the influence of liquor or drugs or violating any law or ordinance as to age or driving license;* (F) If the automobile described herein is used in carrying passengers for compensation (actual or implied) or as a taxicab, or is rented, or leased, or is operated in any race or speed contest, or is used for the transportation of high explosives of any nature, intoxicating liquors, or for the illegal transportation of any property; * * *"

The trial court made the following pertinent findings of fact:

"III.

"That on or about the 16th day of June, 1934, and while said policy was in full force and effect, one Helen B. Anthony *operated* the Chevrolet automobile referred to in and covered by said policy of insurance, with the permission and consent of the assured, R. O. Anthony, and operated the same negligently so as to proximately cause an accident and injury to the person and property of the plaintiff, to his damage * * *."

"XII.

"With regard to the second, separate defense of defendant, the court finds that *the said automobile at the time of the impact that resulted in the injury to the plaintiff was being jointly operated by Helen B. Anthony and Nancy Leidenacker* * * *; *that said Nancy Leidenacker was a minor* * * *; that the assured had forbidden said minor, Nancy Leidenacker, to drive any motor vehicle or automobile of which he was the owner or which he controlled; and that the action of said Nancy Leidenacker on the day of the accident and at the time of the impact involved in this action were in disobedience of and contrary to the commands, orders and instructions of the assured, R. O. Anthony; *that at the time of the accident, insofar as the propulsion of the vehicle was concerned, other than the means of direction, all instrumentalities of said automobile were being physically actuated by said minor, Nancy Leidenacker, with the acquiescence and knowledge of Helen B. Anthony* and without any knowledge, acquiescence or consent on the part of the assured, R. O. Anthony; that the proximate and direct cause of the collision between the insured automobile and a truck * * * was the act of Helen B. Anthony in seizing the steering wheel of the automobile at and immediately preceding the moment of impact and collision."

The court made other findings not here directly involved and concluded:

"From the foregoing facts the court concludes as a matter of law that the plaintiff is entitled to have and recover of the defendant herein judgment * * *."

The majority opinion of the Circuit Court of Appeals affirmed the judgment of the trial court. In so doing, the majority opinion recited that the findings of fact above quoted were "inconsistent", and proceeded to review the bill of exceptions (erroneously stated to be testimony) and disregarded the express finding of the trial court that the automobile was being jointly operated by the adult and the unlicensed minor. The majority opinion expressly recited that that finding of fact by the trial court "is not sustained" by the evidence.

In reaching its conclusion, the majority opinion held that Subdivision (E) of the "Risks Not Assumed by This Company" which reads:

> "The Company shall not be liable and no liability or obligation of any kind shall attach to the company for losses or damage: * * * (E) Caused while the said automobile is being driven or operated by any person whatsoever either under the influence of liquor or drugs or violating any law or ordinance as to age or driving license;"

is controlled by condition (D) which reads:

> "The Company shall not be liable and no liability or obligation of any kind shall attach to the Company for losses or damage: * * * (D) Unless the said automobile is being operated by the assured, his paid driver, members of his immediate family, or persons acting under the direction of the assured."

It is in consequence of said judgment and actions of the Circuit Court of Appeals that your petitioner seeks review by certiorari in this Honorable Court, to determine

the right of the Circuit Court of Appeals to disregard the findings of fact of the trial court, and upon its own examination of the bill of exceptions to set aside such findings as contrary to or not supported by evidence, and the further action of the Circuit Court of Appeals in its construction of the policy which we shall show is contrary to the plain and unambiguous language of the contract, and contrary to the plain, ordinary and popular understanding and construction thereof.

Reasons Relied Upon for the Allowance of the Writ.

It is respectfully submitted by your petitioner and relied upon as reasons for the granting of the writ that:

(A) The action of the Circuit Court of Appeals, in disregarding the express finding of the trial court that the car was being jointly operated and in examining the bill of exceptions and attempting to determine from it that the finding was not supported by evidence, was a departure from the accepted and usual course of judicial proceedings and of such importance as to cause this Court to exercise its power of supervision. The question is of such fundamental importance that it must affect every appealed case in all of the circuit courts. The action of the Circuit Court in the present case is contrary to an unbroken line of authorities descending from the earliest days of decision of this court, as exemplified in *Barnes et. al. v. Williams,* 11 Wheat. 415; 6 Law Ed. 508, to *United States v. Esnault-Pelterie,* 81 Law Ed. Adv. Op. 98;

(B) The action of the Circuit Court of Appeals in holding that the separately stated specifications of

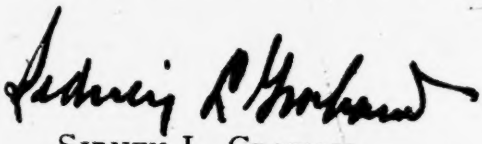
"Risks Not Assumed by This Company" specifying that the Company shall not be liable unless the automobile is being operated by the assured, the paid driver, members of his immediate family or persons acting under the direction of the assured "controlled" the specification that the company shall not be liable for losses or damage caused while the automobile is being driven or operated by any person whatsoever violating any law or ordinance as to age or driving license, is untenable as a matter of law and in conflict with the weight of authority;

(C) That the case involves a question of the weight and consideration to be given by the Circuit Court of Appeals to findings of facts of the trial court and a question of construction of contract, and of an insurance contract, in which there is a peculiar public interest, and presents fundamental questions of law upon which there should be no diversity of opinion in the several circuit courts of appeal. That such diversity exists unless this Court shall exercise its power of supervision and hear and determine the present case.

Wherefor, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals, for the Ninth Circuit, directing that court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket "No. 8330, State Farm Mutual Automobile Insurance Company, a corporation, Appellant, v. James D. Cough-

ran, Appellee", and that the judgment of said court therein be reversed by this Honorable Court, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

October, 1937.



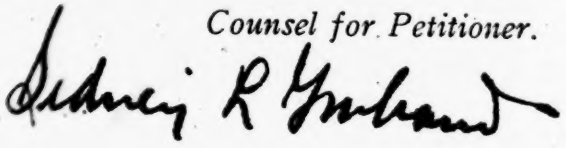
SIDNEY L. GRAHAM,
Counsel for Petitioner.

JOSEPH A. SPRAY and
F. BRITTON MCCONNELL,
Of Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition is well founded and not interposed for delay.

SIDNEY L. GRAHAM,
Counsel for Petitioner.



IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1937.

No. .....

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation,

Petitioner,

vs.

JAMES D. COUGHRAN,

Respondent.

Brief in Support of Petition.

Opinion Below.

No opinion was written by the court of first instance. The opinion in the United States Circuit Court of Appeals for the Ninth Circuit was filed July 26, 1937, and is not yet reported in the Federal Reporter.

Jurisdiction.

The judgment of the Circuit Court of Appeals was filed July 26, 1937. No petition for rehearing in that court was filed. This petition for writ of certiorari is filed within three months after the filing of the judgment of the Circuit Court of Appeals.

The jurisdiction of this court is invoked under section 240 of the Judicial Code, 28 U. S. C. A. 347.

Statement of the Case.

The essential facts of the case are stated in the accompanying petition for certiorari, and in the interest of brevity are not here repeated. Any necessary elaboration will be made in the course of the argument which follows.

Specification of Errors.

The Circuit Court of Appeals erred in each of the following particulars:

(1) In failing to give effect to the special findings of fact of the trial court;

(2) In disregarding the special findings of fact of the trial court and proceeding to an examination of the bill of exceptions and a determination therefrom as to the facts which it conceived ought to have been found by the trial court;

(3) In holding that the findings of the lower court were "inconsistent";

(4) In failing to reverse the judgment and remand for a trial *de novo* if the findings were "inconsistent";

(5) In placing upon the insurance contract a novel and strange construction which is contrary to the plain, unambiguous, common and popular meaning of the language of the contract.

Argument and Authorities in Support of Petition.

In California, as in most other states of the Union, there are state statutes prescribing and regulating the minimum age of operators of automobiles. It is needless to point out by citation of authority that such regulations are based upon a sound public policy, and are designed for the protection of the public. It is but natural and proper that an insurance policy upon automobiles should conform to this public policy and recognize the peculiar and uninsurable hazards which arise from the violation of such statutes. The right of an insurer to exclude from coverage a vehicle being operated by a minor in violation of law as to age or drivers license is expressly recognized by this Court in *United States Fidelity and Guaranty Co. v. Guenther,* 281 U. S. 34-38, 74 Law Ed. 683.

We quote at this point the applicable statutes of the State of California.

The Motor Vehicle Act of California (Stats. 1931, 2108, par. 64 (a), chapter 1026, provides:

> "An operator's license shall not be issued to any person under the age of 16 years, * * *" (Except under circumstances not involved here.)

The Motor Vehicle Act of California (Stats. 1927, page 1427, par. 58 (a), also in effect at the time of the accident herein involved) provides:

> "It shall be unlawful for any person to drive a motor vehicle upon any public highway in this state, whether as an operator or a chauffeur, unless such person has been licensed as an operator or a chauffeur; * * *."

The Motor Vehicle Act of California (Stats. 1923, page 536, par. 76, also in effect at that time) provides:

> "No person shall authorize or knowingly permit a motor vehicle owned by him or under his control, to be driven by any person who has no legal right to do so or in violation of the provisions of this act."

Sections 1 and 18 of the California Motor Vehicle Act (Stats. 1923, p. 518) define an "operator" to be

> "Every person who drives, operates or is in actual physical control of a motor vehicle upon a public highway."

The trial court found and it was a fact which was never disputed, that at the time of the accident Nancy Leidenacker was a child of the age of 13 years who was not and could not under the laws of California have been licensed to drive or operate an automobile upon the public highways. It was found and never disputed that the accident occurred upon a public highway. Nancy Leidenacker was a pupil at a private school operated by Mrs. Helen B. Anthony and her husband, R. O. Anthony, and at the time of the accident Mrs. Anthony was transporting the girl from the school in an adjoining county to her home in the city of Los Angeles.

The provisions of the insurance contract put in issue the question as to whether the accident was "caused *while* the said automobile is being driven or operated by any person *whatsoever* either under the influence of liquor or drugs or *violating any law* or ordinance as to age or driving license."

In response to this issue the trial court made a direct, certain and unambiguous finding of fact in the following language:

"That said Nancy Leidenacker was a minor and not permitted under the applicable laws to operate a motor vehicle in the state of California; * * * that *at the time of the accident,* insofar as the propulsion of the vehicle was concerned, other than the means of direction, all instrumentalities of said automobile were being physically actuated by said minor Nancy Leidenacker, with the acquiescence and knowledge of Helen B. Anthony * * *" [Findings of Fact No. XII on p. 22 of the Tr. of Record],

and the trial court further found:

"That the court finds from the evidence that the Chevrolet automobile was being *jointly operated* at the moment of accident—at the time of impact that resulted in the injury to the plaintiff in this case by Helen B. Anthony and the girl, at that time who was a minor and not permitted under the applicable laws to operate a motor vehicle in the state of California; that as far as the propulsion *or driving of the vehicle was concerned,* other than the means of direction, all instrumentalities were being physically actuated by the minor; (and that said acts were done) with the acquiescence and knowledge of Helen B. Anthony * * *." [Tr. of Record, p. 61.]

Now, especially inviting the attention of the Court to the provisions of the statutes, we submit the following as a concise and logical statement of the matters of fact and principles of law involved (quoting from the dissenting opinion filed in the United States Circuit Court of Appeals by Mr. Justice Wilbur):

"In view of the statutory definitions of what constitutes an operator, namely, one in actual physical

control of a motor vehicle (Cal. Motor Vehicle Act 1, 18, *supra*), and in view of the purpose of the law to protect the public from the lack of judgment and skill of a young child, it seems clear that the child was driving the automobile in the case at bar within the meaning of that term as defined in the statutes of California and, consequently, was violating the law of California, and that the wife also who, in a legal sense had control of the car, was violating the statute by permitting the child to operate the car. Therefore, whether we consider the question from the standpoint of the action of the child or of the wife the car was operated in violation of law as to age and driving license. If it was operated in violation of such a law the policy expressly provides that there shall be no liability on the part of the Insurance Company. If we assume, as the court found, that the car was being jointly operated and that the child had control of some part of the driving mechanism, and the wife had control of another portion, it is still true that each was violating the provisions of the law—the child by driving the car and the wife by permitting her to do so."

The force of this reasoning was sought to be avoided in the majority opinion in the Circuit Court of Appeals in a manner which we shall now discuss. The majority opinion made reference to Finding No. III which recited that

> "Helen B. Anthony operated the Chevrolet automobile referred to in and covered by said policy of insurance, with the permission and consent of the assured, R. O. Anthony, and operated the same negligently so as to proximately cause an accident and injury to the person and property of plaintiff, to his damage * * *."

Comparing this finding with the findings of fact last hereinabove quoted (see Finding XII, *supra*), the majority opinion stated:

> "This finding that the car was jointly operated by Helen B. Anthony and the passenger minor is *inconsistent* with Finding III that Helen B. Anthony operated the car. And to elucidate the truth a review of the testimony is required."

Recalling the provisions of condition (D) of the policy, above quoted, the majority opinion supplemented its comment upon Finding No. III to the effect that Helen B. Anthony operated the insured automobile at the time of the accident, by noting the recitation in Finding XII [Tr. of Record, p. 22] that

> "said Helen B. Anthony was a member of the assured's immediate family * * *"

This finding satisfied the conditions of condition (D) of the policy which required in the first place that the automobile be operated by a member of the immediate family of the assured at the time of the accident in order that the benefits of the insurance protection might be claimed. But this had no relation to the requirements of condition (E) of the policy. This is so because if the fact had been that Mrs. Anthony was in the rear seat of the automobile while it was being driven by the minor, Nancy Leidenacker, Mrs. Anthony would have been operating the automobile in legal contemplation. The distinction has often been noted in the reported cases and while it may not require elaboration we submit the following authority as concisely and correctly disposing of the subject.

In *Bosse v. Marye,* 80 Cal. App. 109, 250 Pac. 693 (Dec. 1, 1936), the facts were that at the time of the accident in question the defendant's automobile was being driven by Helen Marye, an unlicensed minor, with the permission of Claudine Spreckles who sat with her on the front seat. The Spreckles girl was a licensed automobile operator, and, being a minor, the license was issued upon the application of her father who was also a defendant, the state statute imputing any negligence of the minor to the parent upon whose application the license was issued. The defendant father's contention was that he could not be held liable because the automobile was neither driven nor operated by his daughter at the time of the accident. In response to this contention the opinion states:

> "The liability of a parent under the statute mentioned is not limited, however, to negligent acts of the minor resulting from 'driving' an automobile, the statute employing the broader term 'operating or driving', showing a clear intention to include within such liability any negligent act which is the direct result of the privilege extended by the state to said minor, under his or her operator's license to operate an automobile upon a public highway. 'To drive' is defined as meaning, 'to impel the motion and quicken'; whereas, 'to operate' means 'to direct or superintend'. (Century Dictionary). * * * We therefore conclude that, *although not driving the automobile* at the time of the accident, Miss Spreckles was nevertheless in control of its movements, and *was operating the same* over the highway under the authority of her license; and that being so, that she was primarily responsible jointly with Miss Marye for its negligent operation."

Looking now to the findings of fact as to the actions of the two occupants of the insured car, Helen B. Anthony and Nancy Leidenacker, we have, as to the former (Finding No. III), that "Helen B. Anthony operated" the car and the further finding of fact (Finding No. XII) of her "seizing the steering wheel of the automobile at and immediately preceding the moment of impact and collision;" as to the latter, Nancy Leidenacker, that the car was (Finding No. XII) "being jointly operated by Helen B. Anthony and Nancy Leidenacker" and the further finding "that at the time of the accident, insofar as the propulsion of the vehicle was concerned, other than the means of direction, all instrumentalities of said automobile were being physically actuated by said minor, Nancy Leidenacker, with acquiescence and knowledge of Helen B. Anthony * * *."

Consequently there was no conflict between nor inconsistency arising upon the facts found by the trial court. The error of the majority opinion is found in the following language quoted from it:

> "This finding that the car was jointly operated by Helen B. Anthony and the passenger minor is inconsistent with Finding III that Helen B. Anthony operated the car. * * * The conclusion in Finding XII that the passenger minor was a joint driver is not sustained, and has no weight as against Finding III, a finding of positive ultimate fact that Helen B. Anthony was the driver of the car."

This Court will have observed that there actually was no finding by the trial court that "Helen B. Anthony was the *driver* of the car." The finding was that she "oper-

ated" and "jointly operated" with the unlicensed minor. The trial court made no nice distinction between "operating" and "driving". None was required as the policy provision expressly stated as a risk not assumed by the company any loss or damage caused while the automobile was being "driven or operated by any person whatsoever * * * violating any law or ordinance as to age or driving license." The act of Helen B. Anthony thus found by the trial court was in violation of paragraph 76 of the Motor Vehicle Act of California, *supra,* and the act of Nancy Leidenacker was in violation of paragraph 58 and 64 of the same statute above quoted.

While we respectfully submit that there is no inconsistency in the finding of fact of the trial court, this contention in no way qualifies our position that the Circuit Court of Appeals erred in disregarding a finding, or in attempting to reconcile "inconsistent" findings and that the construction placed upon the contract by the majority opinion was untenable and contrary to the weight of authority, which contentions are hereinafter set forth.

There Can Be No Review by the Circuit Court of Appeals of the Findings of Fact Made by the Trial Court. The Facts Are Conclusively Settled by the Findings of the Trial Court.

The principle stated in the caption has been the settled law of the federal appellate courts at least since the decision of this court in *Barnes, et al. v. Williams,* 11 Wheat. 415; 6 Law Ed. 508. The principle has been recognized and followed in innumerable cases in the lower courts. It has often been declared by this Court.

The principle is expressly declared in 28 U. S. C. A., Sec. 773.

In *Town of Walnut v. Wade,* 103 U. S. 683; 26 Law Ed. 526, this Court said:

> "One thing is clear: that there can be no review in this court of the finding of fact made in the court below * * * In *Norris v. Jackson,* 9 Wall. 125, 76 U. S. 608, this Court said: 'A special finding is not a mere report of the evidence, but a statement of the ultimate facts on which the law of the case must determine the rights of the parties; a finding of the propositions of fact which the evidence establishes and not the evidence on which those ultimate facts are supposed to rest. Whether the finding be general or special, it should have the same effect as the verdict of a jury; that is to say, it is conclusive as to the facts so found. In the case of a special verdict (finding) the question is presented as it would be if tried by a jury, whether the facts thus found require a judgment for plaintiff or defendant. The bill of exceptions, while professing to detail all the evidence, is no special finding of the facts."

To the same effect see *Stanley v. Board of Supervisors,* 121 U. S. 443, 30 Law Ed. 1000.

See, also:

Hammer v. The Garfield Mining & Milling Co., 130 U. S. 279, 32 Law Ed. 964;

United States v. Esnault-Pelterie, 81 Law Ed. Adv. Op. 98;

Wear v. Imperial Window Glass Co., 224 Fed. 60.

In *Insurance Co. of. North America v. International Trust Co.*, 71 Fed. 88, the rule was concisely stated by the court as follows:

> "The rule is inflexible in the federal courts that when a jury is waived, and the court makes a special finding, an appellate court cannot look into the evidence on which the finding is based, except for the purpose of ascertaining whether an error was committed in admitting or excluding testimony." (Citing cases.)

The conclusion reached in the majority opinion depended upon the recitation in the opinion that:

> "The conclusion in Finding XII that the passenger was a joint driver *is not sustained* * * *."

The procedure of the Circuit Court of Appeals was clearly in violation of the authorities above cited. Passing beyond this point, however, we must notice the further statement in the majority opinion:

> "And to elucidate the truth, a review of the testimony is required."

As the transcript of record shows, the transcript of the testimony was not brought up to the Circuit Court of Appeals. All that was before it was the bill of exceptions and, likewise, its examination of the bill of exceptions in an attempt to impeach the findings of fact of the trial court was in violation of the authorities.

Even if it were conceded, as stated in the majority opinion, that the findings of fact concerning the identity

of the operator or driver of the automobile were "inconsistent" it was not within the province of the Circuit Court of Appeals to examine the bill of exceptions and adopt findings of fact of its own, but it was the duty of that court to reverse the judgment and remand it to the trial court for a new trial.

In *Graham v. Bayne,* 18 How. 60, 15 Law Ed. 265, this Court said:

> "If a special verdict be ambiguous, or imperfect—if it find that the evidence of facts, and not the facts themselves, or finds but part of the facts in issue, and is silent as to others, it is a mistrial, and the court of error must order a *venire de novo.* They can render no judgment on an imperfect verdict, or case stated."

We conclude consistently with subdivision A of the Reasons Relied Upon for the Allowance of the Writ that the action of the Circuit Court of Appeals in disregarding the express finding of the trial court that the car was being jointly operated and examining the Bill of Exceptions and attempting to determine from it that the finding was not supported by evidence was a departure from the accepted and usual course of judicial proceedings and of such importance as to cause this Court to exercise its power of supervision.

The Policy Contract Was Clear and Unambiguous and Not Susceptible to the Construction Placed Upon It by the Circuit Court of Appeals. The Policy Expressly Excluded the Loss in Question.

We have heretofore quoted verbatim the provisions of the policy involved. The policy is set out verbatim opposite page 16 of the transcript of record. Like all such contracts, it specifies certain risks which are excluded from coverage. It is apparent that there must be many risks which arise in connection with the subject matter of every insurance which are, by their nature, uninsurable. Others involve such a substantial increase of hazard that the underwriter properly excludes them leaving the insurance of such hazards to special contract and agreement for the required additional premium. The present policy was standard in form although not prescribed by any applicable statute. It provides that the insurance is "subject to the terms and conditions of this policy". In a separate subdivision of the policy under a caption in large bold face type it recites "Terms and Conditions Forming a Part of this Policy". This is followed by a further specification in bold face type at the beginning of the succeeding paragraph with the words "Risks Not Assumed by this Company". This is followed by an introductory and governing proviso applicable equally to each of the following subdivisions as follows:

> "The Company shall not be liable and no liability or obligation of any kind shall attach to the Company for losses of damage: * * *."

The colon is then followed by subdivision (A) which relates to personal property excluded from the theft provisions of the policy; (B) to parts not connected with the

automobile; (C) to floods, riots, war, etc., (D) and (E), the subdivisions heretofore quoted verbatim, (F) the carrying of passengers for hire, (G) relating to the interest of the assured in the automobile, (H) to assignments, (I) to the exclusion of workmen's compensation liability, (J) to concurrent insurance, (K) to assumption of liability by agreement as contrasted to liability imposed by law and (L) to subrogation rights. In examining the contract the Court will observe that its manner of subdivision and punctuation is the usual form found in statutes, rules of court and commercial contracts of every kind and description.

The suggestion that these separately stated subdivisions are interdependent and "controlled" one by the other is a novel feature of the majority opinion of the Circuit Court of Appeals and the basis of the error of that court in construing the contract.

We have no quarrel with the authorities holding that where an insurance contract is ambiguous and susceptible to reasonable interpretation, the court will adopt the interpretation most favorable to the insured. We submit, however, that the present contract is not tainted with ambiguity and that this rule has no application in the present case. The statement in the majority opinion is:

> "Both the *insurance* clause and the *exemption* clauses must be strictly construed against the insurer. In thus interpreting these exemptions it appears clear exemption (E) is controlled by (D) as to operator of this car * * *."

The majority opinion therefore apparently contends that insurance contracts are subject to a different rule of construction than contracts of another character. This Court has often pointed out the fallacy of such reasoning.

In the *Imperial Fire Insurance Co. of London, England, v. County of Coos,* 151 U. S. 452, 38 Law Ed. 231, the opinion states:

> "But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense."

The same opinion discusses at some length the nature of contracts of insurance and recognizes the necessity that the insurer define and limit the scope of the indemnity. It is pointed out that "the courts may not make a contract for the parties." This case involved practically the same phraseology as that employed in the contract in the present case. The specification of risks not assumed by the insurer began with a general recitation introducing that subject matter followed by subdivisions separately specifying the several exemptions. The opinion stated:

> "These terms and conditions of the policy present no ambiguity whatsoever. The several conditions are separate and distinct, and wholly independent of each other."

We earnestly invite the attention of the court to the similarity of the contract construed in that case to the contract involved in the present case, and also direct the court's attention to *United States Fidelity and Guaranty Co. v. Guenther,* 281 U. S. 34-38, 74 Law Ed. 683.

A like and exact analogy is found in the recent case of *Travelers Protective Association v. Prinsen,* 291 U. S. 576; 78 Law Ed. 999. The text of the policy provision which corresponds to the policy provision referred to in

the policy in the present case is set forth in the footnote at page 1000 of 78 Law Ed. In that case as in the present case the specifications of the exceptions began with a general introductory statement which was a part of each and every several specification in the remainder of the paragraph. Each of these several specifications was separated by a semi-colon in exactly the same manner as in the present policy.

The erroneous reasoning of the majority opinion may be further analyzed in the light of this instructive opinion. The majority opinion in the present case recited that "the licensed operator of the car was in control and did personally direct the car movement and did physically change the course of the car and ran it into the truck. This was the sole and proximate cause of the accident and without which the accident would not have occurred." Under the explicit language of the present policy the question of proximate cause played no part in determination of the scope of the indemnity. The risk which was stated to be one not assumed by the company was not a risk or loss caused *by* operation of the vehicle by an unlicensed minor but was in the following distinctive language:

> "The company shall not be liable and no liability or obligation of any kind shall attach to the Company for losses or damage caused: * * * Caused *while* the said automobile is being driven or operated by any person whatsoever either under the influence of liquor or drugs or violating any law or ordinance as to age or driving license."

By this form of policy the insurer avoided mystifying subtleties as to causal relation. The plain fact found by the trial court was that at the time of the accident the automobile was being driven or operated in violation of

law as to age or driving license; the loss or damage was caused *while* it was being so driven or operated and it was this risk which was expressly excluded from the insurance.

See also:

Shepherd v. Mutual Life Ins. Co., 63 Fed. (2d) 578;

Maryland Casualty Co. v. Freidman, 45 Fed. (2d) 369;

Order of United Com. Travelers v. Edwards, 51 Fed. (2d) 187.

We therefore submit that the construction placed upon the contract of insurance by the Circuit Court of Appeals is contrary to the plain and unambiguous language of the contract and inconsistent with the plain, ordinary and accepted meaning of the phraseology employed in the contract. Affirmance of the decision would cast doubt upon the meaning of innumerable statutes and contracts and would amount to the overruling of previous decisions of this Court.

In conclusion it is respectfully submitted that this Court should issue its Writ of Certiorari to the United States Circuit Court of Appeals in this action

October, 1937.

SYDNEY L. GRAHAM,
Counsel for Petitioner.

JOSEPH A. SPRAY,
F. BRITTON MCCONNELL,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 519

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

vs.

JAMES D. COUGHRAN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITIONER'S SUPPLEMENTAL BRIEF AND AUTHORITIES.

JOSEPH A. SPRAY,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 519

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

vs.

JAMES D. COUGHRAN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUPPLEMENTAL BRIEF AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

DISCUSSION OF APPELLEE'S CONTENTION THAT "SPECIFICATIONS 1 AND 2 ARE UNTENABLE FOR THE REASON THAT THE CIRCUIT COURT OF APPEALS DID NOT DISREGARD ANY FINDINGS OF THE TRIAL COURT, NOR DID IT DEPART FROM PRECEDENT IN ANY RESPECT."

Appellee's argument on this point entirely ignores the language contained in the majority opinion as follows:

> "This finding that the car was jointly operated by Helen B. Anthony and the passenger minor is incon-

> sistent with Finding III that Helen B. Anthony operated the car. And to elucidate the truth a review of the testimony is required."

Under this heading appellee cites *O'Connell* v. *N. J. Federal Insurance, etc., Co.*, 201 App. Div. 117, 138 N. E. 744, and *Williams* v. *Nelson*, 228 Mass. 191, in support of his contention that the findings taken jointly or severally support the judgment.

We especially invite the Court's attention to the findings of fact in these two cases relied upon by appellee. It will be observed in both of the cases the court found that the minor at the time of the accident *was not exercising any control over the car.*

In both of those cases the defendant insurance company lost in the lower court by virtue of the special findings of the trial court. In this case the findings were in part:

> [redacted] That so far as the propulsion or driving of the vehicle was concerned, other than the means of direction, all instrumentalities were being physically actuated by the minor with the acquiescence and knowledge of Helen B. Anthony. (R 42)

II:

DISCUSSION OF APPELLEE'S CONTENTION THAT THE MAJORITY OPINION FOLLOWS ESTABLISHED SPECIFIC PRECEDENT AND CONFORMS TO THE UNIVERSAL RULES OF CONSTRUCTION APPLICABLE TO INSURANCE CONTRACTS.

In *Coolidge* v. *Standard Accident*, 114 Cal. App. 716, the policy sued upon excluded liability if the insured car was towing a trailer. The court stated in discussing proximate cause:

> "The defendant's exemption from liability does not depend upon the attached trailer becoming the cause of the accident or even contributing to the casualty. The

very fact that the trailer was being towed relieved the defendant from liability."

For a case in which the findings were similar to the ones in the case at bar see *Sears* v. *Illinois Indemnity Co.*, 121 Cal. App. 211. The court found that at the time of the accident the Buick was being driven by the 15 year old minor and also found that the said automobile was operated by defendant Angrimson who was present in the car and that the said automobile was at said time in the control of and under the management of and being operated by said Gilbert Angrimson.

After an exhaustive review of the authorities the court gave judgment in favor of defendant, holding that the violation of the provision by the minor was a good defense.

See also following authorities:

Setson v. *Sun Ind. Co.*, 264 N. Y. S. 519;
Cullen v. *Travelers Ins. Co.*, 214 Wis. 467;
Hudak v. *Union Ind. Co.*, 143 At. 885;
Roberts v. *Ind. Insurance Co. of North America*, 114 W. Va. 252.

III.

PETITIONER WAS NOT BOUND BY THE JUDGMENT IN THE TORT ACTION AS TO WHO WAS DRIVING OR OPERATING THE ASSURED'S CAR.

The rule is stated in Section 4062, Vol. 6, Blashfield's Cyclopedia of Automobile Law and Practice:

"* * * However a method has been worked out and is now resorted to quite frequently whereby the insurance company may give the insured the benefit of a defense by it without jeopardizing its rights to contest liability. * * *"

where at the time of the initial suit it notifies the insured that it does not waive the benefits of such defense and he accedes to such reservations of rights (citing case).

In none of the cases cited by appellee in support of his contention that petitioner was bound by the judgment in the *tort* action was a reservation of rights taken by the insurance company.

The following California cases recognize and support the rule given by Blashfield:

Hynding v. *Home Insur. Co.*, 214 Cal. 743;
Sears v. *Ill. Indemnity Co.*, 121 Cal. App. 211;
Coolidge v. *Standard Accident Co.*, 714 Cal. App. 716;
McDaniels v. *General Insurance Co.*, 1 Cal. App. (2d) 454.

The appellee in this case cannot recover if the assured could not. His rights are no greater or no less than those of the assured.

Royal Ind. Co. v. *Morris*, 37 F. (2d) 90 (9th Circuit);
Calif. Stats. 1919, page 776.

In the *Lamb case*, 3 Cal. App. (2d) 624, cited by appellee, it will be noted that no non-waiver agreement was taken and that the insurance company refused to defend.

Conclusion.

In conclusion we now respectfully submit that appellee has not met the true issue in this case. Let him answer the question as to whether under the findings of the lower court Helen Anthony was violating Section 76 of the Motor Vehicle Act, Calif. Stat. 1923, page 536, or if the minor child was violating paragraph 58A of Calif. Stat. 1927, page 1427.

Your petitioner respectfully submits that the judgment should be reversed.

Respectfully submitted,

JOSEPH A. SPRAY,
Counsel for Petitioner.

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UNITED STATES.

October Term 1937
No. 519.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation,

Petitioner,

vs.

JAMES D. COUGHRAN,

Respondent.

Argument and Authorities in Opposition to Petition for Writ of Certiorari.

JOHN F. GILBERT,
631 Van Nuys Bldg., 210 W. 7th St., Los Angeles, Calif.,
Counsel for Respondent.

PARKER & STANBURY,
RAYMOND G. STANBURY,
1211 Pacific National Building,
315 West Ninth Street,
Los Angeles, California,
Of Counsel.

Parker & Stanbury Corporation, Law Printers, Los Angeles

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Argument and Authorities in Opposition to Petition for Writ of Certiorari.

This brief is respectfully submitted in reply to the contentions of the petitioner.

I.

THE CASE AT BAR IS NOT WITHIN ANY OF THE PROVISIONS OF RULE 38 OF THE SUPREME COURT OF THE UNITED STATES.

It is contended by petitioner that the Supreme Court of the United States should intervene in this action upon the grounds that the Circuit Court of Appeals has departed from precedent, has ignored findings of fact of the trial

court, and has misapplied the law to the insurance contract in question. Respondent most earnestly submits that these contentions are untenable, and spring from a distorted construction of the opinion and a misapprehension as to what the Circuit Court of Appeals plainly did.

The Circuit Court of Appeals did not disregard the findings of the trial court, but on the contrary expressly stated that it was bound thereby [R. p. 95]:

> "This court is bound by the facts found by the trial judge, 28 U. S. C. A., Sec. 875."

The Court then proceeded to find and to declare that the special findings support the judgment. U. S. C. A., Sec. 875, expressly empowers the Circuit Court of Appeals to determine whether or not special findings of fact support a judgment appealed from. The Court decided that either and both of the challenged findings support the judgment. The concluding sentence of the majority opinion is as follows (italics added):

> "The finding elucidated by the evidence does sustain the finding III as the ultimate fact as to operator of the car herein indicated, (and finding XII alone shows operation of the car by Helen B. Anthony), and the general conclusion of law is sustained by the finding *and all sustain the judgment.*" [R. p. 102.]

It is true that the Circuit Court of Appeals found that the *evidence* did not support finding XII (the finding relied on by petitioner), but it concluded that finding XII alone (standing alone) also supported the judgment in

finding that Helen B. Anthony operated the car. (It is clear that the term "alone" in the parenthetical comment above is used in the sense of "standing alone" since finding III declares that Helen B. Anthony operated the car and therefore it was not meant that only finding XII found that fact.)

Petitioner, which now denies the power of the Court to inspect the evidence, expressly requested that the Court do so, notwithstanding the fact that petitioner had not preserved in the record any right to such review. Petitioner's first, second and third specifications of error [R. pp. 71-73] all invited the inspection of the evidence by the Circuit Court of Appeals by asserting that the *evidence* (not merely the finding) required a judgment in petitioner's behalf. Specification XIII [R. p. 78] declares that the *evidence* does not support the findings of fact and thereby solicits a review of the evidence by the Circuit Court of Appeals, notwithstanding the deficiency of petitioner's record. Certainly petitioner, having invited such reference to the evidence, is estopped from claiming error, particularly after the evidence has been found to support all material findings and the judgment.

Finding III and finding XII, taken together and each standing alone, support the judgment imposing liability upon petitioner as insurer, under all of the known law upon the identical subject. (*O'Connell v. N. J. Fed. Ins. etc. Co.*, 201 App. Div. 117, 138 N. E. 744, *Williams v. Nelson*, 228 Mass. 191, 117 N. E. 189.) The cited cases, discussed in the third section of this brief, and decided by

the highest court of Massachusetts and New York, involve identical policies of insurance and identical facts as to the operation of the insured cars, and each holds the insurer liable. No contrary decision is known to counsel for either party. Petitioner's contention that the decision of the Circuit Court of Appeals places a novel and unusual construction upon the policy is in direct contradiction of the true situation.

For the sake of convenience petitioner's contentions, grouped as five specifications of error (Petition p. 14), are considered in chronological order.

A. Specifications 1 and 2 Are Untenable for the Reason That the Circuit Court of Appeals Did Not Disregard Any Finding of the Trial Court, Nor Did It Depart From Precedent in Any Respect.

It is contended by petitioner that the Circuit Court of Appeals disregarded the special findings of the trial court. This conclusion may be reached only by distorting the opinion, by isolating a certain portion thereof and by ignoring the ultimate conclusion of the Court, supported by authority, that *all* of the findings supported the judgment. This was all to which petitioner was entitled, and the inspection of the evidence by the Court, which petitioner had requested in its specifications of errors, could in no way have resulted in prejudice. As quoted above, the Circuit Court of Appeals expressly stated that it was bound by the findings of the trial court, and it then held that all of the findings support the judgment.

It must be conceded by petitioner that the Circuit Court of Appeals was empowered to determine whether or not the findings support the judgment. U. S. C. A., Sec. 875, concludes as follows:

> ". . . and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

Each and all of the findings concerning the operation of the car, taken jointly or severally, support the judgment under the authorities cited and discussed hereinafter.

Finding III, standing alone, supports it.

Finding XII, standing alone, supports it. (*O'Connell v. N. J. Fed. Ins. etc. Co.,* 201 App Div. 117, 138 N. E. 744; *Williams v. Nelson,* 228 Mass. 191, 117 N. E. 189.)

Finding XVII [R. p. 25] supports it. (Authorities, ***supra.***)

All of the findings, taken together, as found by the Circuit Court of Appeals, also support the judgment, including finding XII, which petitioner contends entitles it to judgment. To reiterate, the concluding sentence of the majority opinion is (italics added):

> "The finding elucidated by the evidence does sustain the finding III as the ultimate fact as to operator of the car herein indicated, (and finding XII alone shows operation of the car by Helen B. Anthony) and the general conclusion of law is sustained by the finding *and all sustain the judgment.*" [R. p. 102.]

The Circuit Court of Appeals, in arriving at this conclusion, is not only supported by general and fundamental rules of construction applicable to insurance policies, but by specific adjudications of the rights of the parties in

identical and indistinguishable situations, by the highest courts of Massachusetts and New York. There is no authority to the contrary.

The gist of petitioner's complaint and the phase of the opinion which arouses petitioner's apparent apprehension as to the effect of the opinion upon precedent, is the fact that the Circuit Court of Appeals made reference to the evidence for the purpose of deciding whether there existed any evidentiary support of the findings. It is asserted by the petitioner that the Circuit Court of Appeals is not empowered to do this. This assertion is made in the face of the fact that petitioner itself assigned in its specification of errors, as grounds for reversal, the insufficiency of the *evidence* to support the judgment. In this regard petitioner has not correctly stated the rule. The true rule is that where appellant's record has been properly preserved, the Circuit Court of Appeals may always ascertain whether or not there is *any* evidentiary support for the findings of the trial court.

Barnsdall v. Waltemer, 142 Fed. 415, 417;

Ward v. Joslin, 186 U. S. 142;

Laing v. Rigney, 160 U. S. 531, 540;

Societe Nouvelle d'armement v. Barnaby, 246 Fed. 68.

In *Laing v. Rigney,* 160 U. S. 531, at page 540, the Supreme Court of the United States stated:

> "The plaintiff duly excepted to the findings and conclusions, and it is well settled that exceptions to alleged findings of fact because unsupported by evidence present questions of law reviewable in courts of error."

In *Ward v. Joslin,* 186 U. S. 142, at page 147, the Supreme Court of the United States said:

> "When a case is tried by the court without a jury, its findings on questions of fact are conclusive, although open to the contention that there was no evidence on which they could be based."

The true rule, therefore, is that where an exception has been taken to a finding, or where by some other process the attention of the trial court has been directed to the insufficiency of the evidence to support the same, the question of the *existence* of evidence becomes one of law, and the reviewing court may consider it. In the case at bar petitioner sought a review of the evidence by the Circuit Court of Appeals. It did not confine itself to an attack upon the findings, but asserted the insufficiency of the evidence to support the findings. It is and was the contention of petitioner that the evidence entitles it, as a matter of law, to judgment, and that a judgment for respondent is without evidentiary support. There is no authority sustaining this contention, the authorities being instead definitely to the contrary. But were it as contended by petitioner, it would have been necessary for the petitioner to have made a motion for judgment, or in some other manner to have presented the question of the legal sufficiency of the evidence to the trial court for a ruling, otherwise petitioner is precluded in the appellate court.

The following quotation is from *Wear v. Imperial Window Glass Co.,* 224 Fed. 60, at page 63, 139 C. C. A. 622, at page 625, and is quoted verbatim and followed in *Hirning v. Live Stock National Bank,* 1 Fed. (2d) 307, at page 310:

> "When an action at law is tried without a jury by a federal court, and it makes a general finding, or a special finding of facts, the act of Congress forbids a reversal by the Appellate Court of that finding, or the judgment therein, 'for any error of fact,' and a finding of fact contrary to the weight of the evidence is an error of fact. The question of law whether or not there was any substantial evidence to sustain any such finding is reviewable, as in a trial by jury, only when a request or a motion is made, denied and excepted to, or some other like action is taken which fairly presents that question to the trial court and secures its ruling therein during the trial."

In the case of *First National Bank of Ardmore v. Litteer,* 10 Fed. (2d) 447, appellant challenged the sufficiency of the evidence to support the special findings of the trial court. The Court stated (p. 448):

> "At the trial below counsel for plaintiff did not except to any of the findings, did not request any additional finding, and did not by motion or other like action challenge the sufficiency of the evidence to support the finding. . . .
>
> "The question of law whether or not there was any substantial evidence to sustain any such finding is reviewable, as in a trial by jury, only when a request or a motion, made, denied, and excepted to, or some other like action is taken wihch fairly presents that question to the trial court and secures its ruling thereon during the trial."

To the same effect is *Flour City Ornamental Iron Works v. Schuler,* 260 Fed. 662, and *Caldwell v. Blodgett,* 256 Fed. 744, at page 745.

In the case at bar no motion for judgment was made by petitioner, no motion for any specific finding was made by it, no findings whatever were requested by it, no request for a declaration of the law was made and no exception was taken to any of the findings of the trial court. In brief, the question of the legal effect of the uncontradicted evidence in the case at bar was never raised in the trial court. This alone precludes petitioner from a further review of the case.

Notwithstanding the fact that the petitioner presented no record to the Circuit Court of Appeals entitling it to any review of the evidence, petitioner requested that the Court review the evidence. Had the Circuit Court of Appeals gone behind the findings of fact and determined that some material finding was not supported by the evidence thereby reversing the judgment, petitioner, and not this respondent, would have gained thereby. This discussion is of purely academic interest for the reason that the decision of the Circuit Court of Appeals was that the findings support the judgment, that every material finding was supported by the evidence, and that even finding XII, relied on by petitioner, supports the finding of the ultimate fact as to the operator of the car. Reply is made thereto because of the vigor with which petitioner, proceeding upon a mistaken premise as to what the Court did, attacks its decision.

Had the petitioner preserved its record it would have been entitled to a review of the evidence for the purpose of determining whether or not there was any evidence to

support the findings of the trial court (authorities *supra*). Petitioner received such a review, notwithstanding the fact that it was not entitled thereto. May a litigant in such a position assign as error the action of an appellate court in looking behind adequate findings and determining that the evidence, as well as the findings, supports the judgment of the trial court? The present contentions arise from a failure on petitioner's part to realize that a review of the evidence in this case, *the findings being such as to support the judgment,* could aid only it and in no way the respondent, for the findings, standing alone, entitled respondent to an affirmation of the judgment. Paradoxically, a legal shield of the respondent is sought to be wielded by petitioner as a sword.

The opinion of the Circuit Court of Appeals may be read from beginning to end and nowhere is there any evidence that a finding of the trial court was ignored. The Court found an inconsistency, and that the finding relied on by petitioner was unsupported by the evidence, but it correctly concluded that under *either or both* of these findings respondent was entitled to judgment. The Court performed its statutory duty of determining whether the findings support the judgment and decided that they did. Authorities sustaining this conclusion are discussed in the third section of this brief. The fact that the Court went further, with or without the request of petitioner, and ascertained that the evidence also supported the judgment could not have prejudiced petitioner.

B. Specifications 3 and 4 Alleging That the Circuit Court of Appeals Held the Findings of the Trial Court to Be Inconsistent and That a New Trial Was Therefore Required Is Untenable Because in Fact the Circuit Court of Appeals Found and Held That Each of the Findings Jointly and Severally Support the Judgment of the Trial Court.

Assuming inconsistency in the findings, it is clear that no prejudice resulted to petitioner when each and all of the findings establish petitioner's liability. Under general principles of insurance law and under previously adjudicated cases on indistinguishable facts, petitioner's liability is established by any and all of the trial court's findings. When the Circuit Court of Appeals decided that the findings supported the judgment, this was all to which petitioner was entitled.

C. The Fifth Specification Alleging That the Opinion Places Upon the Contract a Novel and Strange Construction Contrary to Its Language Is Untenable Since the Opinion Not Only Follows Established Specific Precedent, But Also Conforms With the Universal Rules of Construction Applicable to Insurance Contracts.

The attention of the Court is respectfully called to the following decisions:

O'Connell v. N. J. Fed. Ins. etc. Co., 201 App. Div. 117, 139 N. E. 744;

Williams v. Nelson, 228 Mass. 191, 117 N. E. 189.

In each of the above cases, policies of insurance issued by the defendant contained the same exclusion clauses as to minors as did the policy in the case at bar. In each

of them at the time of the accident, a minor excluded by the policy, occupied the driver's seat with an adult person to his right. In each of them, the adult person seized the wheel as in the case at bar and was steering the car at the time of the accident. In each of them, it was held that the insurer was liable notwithstanding the exclusion clause of the policy. The trial court was justified in finding as a fact that Helen B. Anthony was driving the car at the time of the accident. The evidence in the case at bar was indistinguishable from the evidence in the cases cited in which such findings were approved.

In the case of *O'Connell v. N. J. Fed. Ins. etc. Co., supra,* the policy provided as follows (p. 117; italics added):

> "This policy does not cover loss on account of injury or death suffered by any person or persons caused by an automobile (a) *while* driven by or in charge of any person in violation of law as to age, *or in any event under the age of 16 years.*"

The facts as taken from the abstract of that case were as follows (italics added):

> "The assured's automobile was being driven by his granddaughter, a 14 year old girl. In crossing a bridge where repair work was going on, she attempted to turn out around the repair work, and in so doing headed the automobile for the bridge railing. The assured, *who was sitting next to her, acted in this sudden emergency, seized the wheel and turned the car sharply* to avert plunging over the side of the bridge, and in so doing swung the car against the deceased, who was working on the bridge, throwing him therefrom."

It will be seen that the facts of the accident were identical to those in the case at bar, in which Helen B. Anthony seized the steering wheel and turned the car sharply against the truck which was engaged in passing the respondent, causing it to collide with him. The exclusion of the policy was also identical. The insurer was held liable under the policy to the heir of the deceased.

In the case of *Williams v. Nelson, supra,* the exclusion of the policy was likewise identical and the facts of the accident the same. The insurer was held liable notwithstanding the exclusion clause.

None of the cases cited by appellant involve facts in any way similar to the case at bar.

Entirely aside from these specific adjudications, general principles of construction applicable to insurance policies establish petitioner's liability. It was conceded by petitioner, as pointed out in the opinion of the Circuit Court of Appeals, that "the question presented was a simple question of interpretation of a contract." It is a platitude of insurance law that policies of insurance, in cases of uncertainty, due to clauses which conflict under the circumstances of the casualty, or for any other reason, are to be construed against the insurer, and in favor of protection rather than against it. The uncertainty invoking this rule of construction may arise from the nature of the casualty as well as from the language of the policy. It is stated by the Supreme Court of the United States in the case of *Liverpool and London and Globe Ins. Co. v. Kearney,* 180 U. S. 132, 45 L. Ed. 460, at page 136 of the U. S. report:

> "To the general rule, there is an apparent exception in the case of contracts of insurance, namely, that where a policy of insurance is so framed as to

> leave room for two constructions, the words used should be interpreted most strongly against the insurer."

Authorities to this effect are absolutely legion and an extensive citation thereof would be a mere task of supererogation. In volume 32, *Corpus Juris,* page 1150, section 259, in the text supported by footnotes 66 and 67, which footnotes contain scores of supporting decisions, it is stated:

> "Insurance or indemnity against loss, being the object and purpose of the contract, the courts will construe it, when possible, so as to effectuate this purpose and so as to uphold rather than defeat or avoid, the contract."

It is likewise an axiom of insurance law that exclusion clauses, such as is relied upon by petitioner herein, are to be construed most strongly against the insurer. As stated in volume 32, *Corpus Juris,* commencing at page 1155, section 266, and ending at page 1157, in the text supported by footnote 14:

> "The rule requiring a strict construction against the company and a liberal construction in favor of insurance applies . . . (to) conditions or other provisions employed for the purpose of creating exceptions to, or limitations upon, the liability of the company;"

In *Thames and Mersey Marine Ins. Co. v. Pacific Creosoting Co.,* 223 Fed. 561, a decision of the Ninth Circuit Court of Appeals, it is stated at page 567:

> "It is a fundamental rule in the law of insurance that a stipulation in a policy which is in the nature of an exception to the liability of the insurer, must be

> construed strictly against it, and that words of exception in the policy, if doubtful, are to be construed most strongly against the party for whose benefit they were intended."

The Supreme Court of California, in the case of *Pacific etc. Co. v. Williamsburg etc. Insurance Co.*, 158 Cal. 367, a case in which the uncertainty arose from the nature of the casualty, stated at pages 369-370:

> "But while this is true, it is also a rule well established by the courts, that provisos and exceptions contained in a policy of insurance must be strictly construed against the insurer and liberally in favor of the assured."

The nature of the contingency which arose here is such, under petitioner's contention, as to bring these elementary rules of construction into operation and it was expressly contended to be so in petitioner's opening brief as hereinabove quoted in the opinion of the Circuit Court of Appeals. In the light of this contention, it is found that appellant undertook to insure R. O. Anthony: "Part II. Against legal liability imposed upon the assured resulting solely and directly from an accident by reason of the ownership, maintenance or use of the automobile . . ." and (Part II, clause E, 1 (D)), while "the said automobile is being operated by the assured, his paid driver, members of his immediate family, or persons acting under the direction of the assured." liability was imposed upon R. O. Anthony solely by reason of his "ownership . . . of the automobile", (there being no allegation of agency) by a member of "his immediate family". This is the insuring clause. The exclusion clause provides (Part II, Clause E, 1 (E)) that there is no coverage if the automo-

bile is "being driven or operated by any person . . . violating any law or ordinance as to age or driving license". Under appellant's contention, the car was being driven and operated by two people, one of whom is covered and the other of whom is not.

It is a very common occurrence for an insured risk and an excluded risk to concur in some measure in producing a loss. It is uniformly held in such circumstances that if the insured risk is the proximate cause of the loss, the insurer is liable. The proximate cause of the loss in question was the insured risk, *i. e.,* the act of Helen B. Anthony. [Finding XVII, R. p. 25; Finding XII, R. bottom pp. 22-23.]

Illustrative of the rule are the following California decisions:

In *Wilson v. Travelers Ins. Co.,* 183 Cal. 65, the defendant insurer had issued a policy of accident insurance protecting the assured against injuries sustained through the "wreckage of a passenger car". It expressly excluded liability for injuries caused by an explosion. The assured was injured through the wrecking of a passenger car caused by an explosion and the insurer was held liable under the general insuring clause, the actual proximate cause of the injury being the wrecking of the car.

In *Pacific etc. Co. v. Williamsburg etc. Ins. Co.,* 158 Cal. 367, the policy of insurance protected the assured against losses caused by fire, but expressly excluded liability for losses caused "by or through" earthquake. An

earthquake started a fire which destroyed the assured's property. It was held that the true and proximate cause of the loss was the fire and the insurer was held liable under the general insuring clause, the exclusion not vitiating it.

In *Lamb v. Belt Casualty Co.*, 3 Cal. App. (2d) 624, the insurer covered a truck but expressly excluded liability for damage caused by a trailer. Both a truck and trailer caused the loss and the insurer was held liable. The exclusion clause as to the trailer did not vitiate the insuring clause covering the truck. In that case, unlike the one at bar, the excluded risk was also a proximate cause of the accident, and as the facts show, actually the proximate cause.

In the case of *German Fire Ins. Co. v. Roost,* 55 Ohio St. 581, 45 N. E. 1097, the policy covered damage caused by lightning, but excluded damage caused by explosion. Lightning struck some stored explosives across the street from the insured premises, causing an explosion which destroyed the same. It was contended by the insured that this was a loss caused by lightning and therefore covered by the policy. It was contended by the insurer that the proximate cause of the loss was the explosion. It was held that the insurer was not liable, the lightning being a remote cause. The Court there stated as follows:

> "Respecting the first proposition, it may be said that undoubtedly the rule is that the proximate and not the remote cause of the loss is to be regarded in determining the liability . . . and it is contended

> here, with much effect, that the true rule is that where a new cause has intervened between the fact accomplished and the alleged cause, such new cause must be considered the real cause; . . . that the force and energy which produced the mischief came not from the lightning but from the explosion, and therefore the explosion was a new cause, which intervened, and hence must be regarded as the proximate cause."

The above decision and language quoted therefrom are peculiarly applicable to the case at bar. The proximate cause of the loss here involved has been found by the Court to have been an insured risk, *i. e.,* the act of Helen B. Anthony. Her act was a new cause which intervened between the conduct of Nancy Leidenecker and the injury to this respondent. Although in the cited case the intervening cause was the excepted risk, the rule is obviously the same. In the case at bar, the intervening and proximate cause was the insured risk.

In the case of *Hustace v. Phenix Ins. Co. of Brooklyn,* 175 N. Y. 292, 67 N. E. 592, the policy of insurance covered loss by fire, but expressly excluded loss by explosion. A fire elsewhere caused an explosion which damaged the insured property. It was held that the proximate cause of the loss was the explosion and not the fire, and the insurer was exempted from liability. In the case at bar, the intervening and proximate cause was the insured risk.

If an insured risk and an excluded risk concur in producing a loss, the insured risk being the proximate cause thereof, the insuring clause governs and the insurer is liable.

In the instant case, the proximate cause of the accident was the driving of Helen B. Anthony as found by the trial court. The analogy is obvious and Nancy Leidenecker is relegated to a more remote position in the chain of causation than the earthquake, explosion and lightning in the cases cited. The true causes there were those which proximately caused the losses. The true cause here was the act of Helen B. Anthony as shown by the undisputed evidence and as found by the trial court.

Petitioner seeks to interpret the exclusion clause as the entire contract, and to accept as the sole cause of the casualty the presence of Nancy Leidenecker in the automobile, notwithstanding the fact that the trial court has found from undisputed evidence that Nancy Leidenecker's conduct was not the cause of the accident, but that the accident was proximately caused by Helen B. Anthony. Appellant seeks to see only the exclusion clause in the policy, and only Nancy Leidenecker in the automobile. Hypothetically, under appellant's contention, we have presented a case in which an insurer covers A, excludes B; both A and B are driving and operating the car under this contention, a contingency not provided for in the policy; A's act is the proximate cause of the loss, and the insurer seeks to ignore its coverage of A and to rely entirely upon its exclusion of B. It was the insured risk

which proximately caused the loss. It would require a unique rule of construction to exempt the insurer from liability because of an exclusion clause concerning B, who did not cause the accident, in the presence of an insuring clause concerning A, who did cause the accident. The insuring clause and the rights accruing to the insured and respondent thereunder commands at least the same force and effect as the exclusion clause. In fact, under the uniform decisions of the courts, it plainly commands more force. And the scales are definitely, although unnecessarily, tipped in favor of the respondent by the fact that the driver who caused the accident is described in the insuring clause.

It is not necessary for the application of the rule of construction governing insurance policies that the uncertainty should arise from the language of the policy. The uncertainty may arise from the nature of the casualty as is demonstrated by all of the decisions hereinabove cited, in each of which the language of the policy was clear but the contingencies which arose were such that they belonged partly in the insuring clause and partly in the exclusion clause.

No case conflicting with these principles has been cited by petitioner and counsel for respondent is unaware of any such decision. There is no legal basis for the contention that the opinion of the Circuit Court of Appeals places upon the policy in question a new or novel construction. On the contrary, the opinion of the Court conforms with specific precedent and general precedent.

CONCLUSION.

It is respectfully submitted that the case at bar presents no problem coming within Rule 38 of the Supreme Court of the United States. The Circuit Court of Appeals decided that all the findings of the trial court support the judgment. The review of the evidence which brought the same results was without prejudice to petitioner. No decision in conflict with the one at bar has been cited. Respondent respectfully prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

JOHN F. GILBERT,
Counsel for Respondent.

PARKER & STANBURY,
RAYMOND G. STANBURY,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 519

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

vs.

JAMES D. COUGHRAN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

RESPONDENT'S SUPPLEMENTAL BRIEF AND AUTHORITIES.

This memorandum is respectfully submitted in support of the judgment heretofore rendered, and to supply authorities not contained in respondent's brief in opposition to the petition for writ of certiorari, to which brief, however, reference is hereby made.

I.

Petitioner May Not Litigate, in This Action, the Question of Who Drove the Car at the Time of the Accident.

The facts were known to petitioner at the time of the original trial in the *tort* action (R., Finding XI, pp. 14-15;

Finding XVI, p. 17; p. 43). At that time petitioner chose to rely upon the testimony of Helen B. Anthony which it believed to be false (R. 38, last paragraph; p. 39 (top)). The facts were first revealed to this respondent and his counsel after petitioner's defense based upon Helen B. Anthony's testimony had failed (R. 38).

A. California Law.

It is the law of California that a judgment against an assured is binding and *res judicata* as to the insurer, on every material fact concerning the nature of the casualty, if such fact could have been litigated in the original action.

Lamb v. *Belt Casualty Co.*, 3 Cal. App. (2nd) 624, 40 Pac. (2nd) 311;
Parra v. Traeger, 214 Cal. 535, p. 538;
Civil Code of California, Sec. 2778.

The case of *Lamb* v. *Belt Casualty Co., supra,* holds that the material allegations of the complaint concerning the nature of the loss or casualty, determine that question. This decision seems not to require that the issue be triable in the *tort* action for it is not easy to understand how the question of proximate cause as between the truck and the trailer could have been tried conveniently in the action against the assured. In the case at bar, however, it is not necessary to go so far.

The entire sequence of events surrounding Nancy Leidenacker was highly material and could and should have been litigated in the original *tort* action. The assured was sued on a theory of permissive use only. There was no allegation of agency. The evidence showed that the assured had forbidden Nancy Leidenacker to drive his car, and counsel for petitioner knew of this fact (R. 28, fol. 40; p. 41, fol. 60; p. 42, fol. 61). The trial judge in the case at bar found this evidence to be true and that Nancy Leidenacker had

no permission from the assured to drive the car (R. 42, fol. 61). It is the law of California that an automobile owner is not liable, in the absence of agency, when no permission actually exists,

Bradford v. *Sargent,* 135 Cal. App. 324, 27 P. (2nd) 93,

and that where permission exists the owner is liable only within the scope and terms thereof.

di Rebaylio v. *Herndon,* 6 Cal. App. (2nd) 567, 44 P. (2nd) 581.

Therefore, if the facts had been shown it would have appeared that Nancy Leidenacker had no permission, and that Helen B. Anthony had exceeded the terms of hers. By suppressing these facts petitioner exposed its assured to a liability which might not otherwise have been imposed upon him. What excuse is offered for the trial of the original action upon testimony petitioner secretly believed to be perjurious? It is that petitioner's counsel did not wish to impeach his own client (R. 38, fol. 56), and that the facts as now revealed would have impaired petitioner's prospects for a successful defense (R. 39, top). May it be remembered that Helen B. Anthony was not an assured, that petitioner owed her no contractual duty, and that by requesting a continuance and substituting other counsel its imagined embarrassment would have been removed. No motion for continuance was ever made (R. 38).

b. *Law of United States Courts.*

It has also been held by this Court that a judgment against an assured is binding upon one secondarily liable as to all facts material to the original action, where the latter had a chance to defend.

Washington Gaslight Co. v. *District of Columbia,* 161 U. S. 316, p. 329, *et seq.,* 40 L. Ed. 712.

It has also been so held by the Circuit Courts of Appeal.

Int. Ind. Co. v. *Steil,* 30 F. (2d) 654, p. 655;

Royal Ins. Co. v. *St. L. & S. F. Ry. Co.,* 291 Fed. 358.

It is conceded in the dissenting opinion in the case at bar that this is so (R. 67), but the learned judge places an unwarranted limitation upon the rule, intimating that it fixes the amount of the judgment, and the liability of the assured alone. There is no authority for this limitation. The case cited (*Lamb* v. *Belt Casualty Co., supra*) *holds that it fixes* the assured's liability *and* that it fixes it as alleged in the complaint.

II.

The Policy May be Reasonably Construed so as to Preserve the Insurance.

Wherever possible and reasonable, a construction preserving insurance coverage should be adopted in preference to one defeating it.

Liverpool & London & Globe Ins. Co. v. *Kearney,* 180 U. S. 132, at p. 136;

Thames Mersey Marine Ins. Co. v. *Pacific Creosoting Co.,* 223 Fed. 561, p. 567;

Pacific, etc., Co. v. *Williamsburgh, etc., Co.,* 158 Cal. 367.

The construction respondent prays for preserves to petitioner its true intention. It is this: Petitioner intended to distinguish between adult and presumably responsible persons on the one hand and immature and infirm persons on the other. The exclusion clause was not written in contemplation of these peculiar facts. Before the policy was issued the identical clause had been judicially interpreted (*O'Connell* v. *N. J. Fed. Ins. Co.,* 201 App. Div. 117, 138

N. E. 744, 235 N. Y. 583; *Williams* v. *Nelson,* 228 Mass. 191, 117 N. E. 189), and petitioner certainly had notice that the clause *might* be interpreted again as now prayed by respondent. Yet it made no change in the phraseology of the policy, although it determined the wording thereof. Furthermore, all petitioner had in mind was to exempt itself from liability created by those who are too young or too inexperienced to be licensed. It has been found by the trial court, upon ample evidence, that the accident in question was caused by Helen B. Anthony, an adult person. *The accident was caused by a member of a class to whom petitioner intended to extend coverage and not by one intended to be excluded* (R., Finding III, p. 12; Finding XVII, p. 17). Mrs. Anthony caused assured's car to be placed in the perilous position in the first place by urging Nancy Leidenacker to pass the truck (R. 29, mid. page), and Mrs. Anthony herself seized the steering wheel and gave the car the direction which alone caused the injury to respondent (R. 33, top; p. 34, top; p. 23, top).

It thus conclusively appears that the accident was caused by a member of that class of persons to whom petitioner was willing and intended to extend coverage. The conduct of Nancy Leidenacker was not the proximate cause of the accident under the findings of the trial court.

In conclusion it is respectfully pointed out that petitioner's defense that both Helen B. Anthony and Nancy Leidenacker drove the car in violation of law as to age, is not pleaded. The sole plea is that the car was driven by a person in violation of law as to age and that the driver was Nancy Leidenacker (R. 6-7, I). In any event it was not the act of Helen B. Anthony *in giving permission* to Nancy Leidenacker to drive which caused the accident, for Nancy Leidenacker did not cause the accident, as the

trial court herein found. The accident was caused by the individual and insured conduct of Helen B. Anthony in directing the passing to be commenced and in personally seizing the wheel thereafter and steering the car so as to cause the accident in question.

It is most earnestly and respectfully submitted that this construction of the policy is reasonable, and if so, it should be adopted as it preserves the insurance coverage. A reversal of this judgment will expose the assured to a liability he might not have had if petitioner had presented the facts when it defended him. It is reasonable because it preserves to petitioner its true intention: to assume responsibility for adult behavior, but not for the immature and infirm. *This casualty was proximately caused by adult behavior,* as the record shows, and petitioner is bound by the record. If petitioner, in issuing the policy, considered the possibility of such a contingency as this, it was apparently satisfied with the prior adjudication, which, regardless of any and all distinguishing features, assuredly gave it notice of the judicial trend. No authority in point is cited by petitioner and the New York and Massachusetts decisions cited by respondent are strong precedent in his favor. (The judgment of the Appellate Division of the Supreme Court of New York on undistinguishable facts in *O'Connell* v. *N. J. Fed. Ins. Co., supra,* was affirmed by the Court of Appeals, 235 N. Y. 583.) In addition, under the law of California, since the evidence now adduced was highly material and properly triable in the *tort* action, petitioner is now estopped from trying it at all. The decision of this Court in *Washington Gaslight Co.* v. *District of Columbia, supra,* and of the Circuit Courts of Appeals in *International Indemnity Co.* v. *Steel, supra,* and *Royal Ins. Co.* v. *St. L.-S. F. Ry. Co., supra,* support the California rule.

It is respectfully prayed that the judgment of the District Court and of the Circuit Court of Appeals be affirmed.

Respectfully submitted,

JOHN F. GILBERT,
217 Van Nuys Bldg.,
Los Angeles, Calif.,
PARKER & STANBURY,
RAYMOND G. STANBURY,
315 W. 9th St.,
Los Angeles, Calif.,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 519.—October Term, 1937.

State Farm Mutual Automobile Insurance Company, Petitioner, vs. James D. Coughran. } Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[March 28, 1938.]

Mr. Justice McReynolds delivered the opinion of the Court.

Petitioner's policy insured one R. O. Anthony, the owner, against liability for injuries caused by a designated automobile. As the result of alleged negligent and unlawful action by the assured's wife the car collided with a truck June 16, 1934. Respondent Coughran suffered injuries for which he recovered judgment against Anthony, also against his wife. Both were insolvent; a writ of execution against them was returned unsatisfied.

Thereupon respondent commenced this suit to recover of petitioner the amount of his unpaid judgment. He claimed this right under the policy and statute. Answering, the company exhibited the policy and denied liability. As a first separate defense it alleged that Anthony and his wife had not complied with certain terms of the contract. As a second—

"That said accident was an accident for which the defendant under the terms and conditions of said policy is not liable in that: At the time and place of the accident the automobile of the insured was being driven and operated by a person who was not the paid driver of the insured, nor a member of his immediate family, nor a person acting under the direction of the assured. This defendant alleges that the said automobile at the time of the accident was being driven and operated by a person in violation of the laws of the State of California as to age and as to driver's license and further alleges that the driver of said car was a minor, being a female of the age of approximately 13 years."

There were other separate defenses.

A jury having been waived, the cause went to the court on the pleadings and evidence. It made findings of fact with conclusion

of law and entered judgment for Coughran. Neither side requested other or different findings.

The Circuit Court of Appeals thought findings III and XII were inconsistent "and to elucidate the truth a review of the testimony is required." After such review it ruled that the findings so elucidated were adequate and required affirmation of the challenged judgment. One judge thought otherwise and presented a separate opinion.

Under applicable statutes and repeated rulings here, the matter open for consideration upon the appeal was whether the findings of the trial court supported its judgment. To review the evidence was beyond the competency of the court. U. S. C. A. Title 28, §§ 773, 875; *Walnut* v. *Wade*, 103 U. S. 683, 688; *Stanley* v. *Board of Supervisors*, 121 U. S. 535, 547; *Law* v. *United States*, 268 U. S. 494, 496.

Two persons were in the insured automobile when the accident occurred. Nancy Leidendeker, a girl of 13 without license to drive, occupied the driver's seat. By her side sat Helen B. Anthony, wife of the assured, an adult holding a driver's license.

The principal point upon which the petitioner now relies is that as the accident occurred when the car was being driven and operated by the young girl contrary to the owner's commands and in violation of California statutes, the policy did not cover his liability.

The policy (incorporated in the findings) under the heading "Terms and Conditions Forming a Part of This Policy", provides—

"(1) *Risks Not Assumed by This Company.* The Company shall not be liable and no liability or obligation of any kind shall attach to the Company for loss or damage: . . . (A) . . . (D) Unless the said automobile is being operated by the Assured, his paid driver, members of his immediate family, or persons acting under the direction of the Assured; (E) Caused while the said automobile is being driven or operated by any person whatsoever either under the influence of liquor or drugs or violating any law or ordinance as to age or driving license; (F) . . . ."

Applicable sections of the California Vehicle Act,—Stats. 1923, pp. 518, 519, 536; Stats. 1927, p. 1427; Stats. 1931, p. 2108—follow:

"Section 1. The following words and phrases used in this act shall have the meanings here ascribed to them."

. . . . . .

"Sec. 18. "*Operator*". Every person who drives, operates or is in actual physical control of a motor vehicle upon a public highway."

"Sec. 76. *Unlawful to employ unlicensed chauffeur.* No person shall employ for hire as a chauffeur of a motor vehicle, any person not licensed as in this act provided. No person shall authorize or knowingly permit a motor vehicle owned by him or under his control, to be driven by any person who has no legal right to do so or in violation of the provisions of this act."

"Sec. 58. *Operators and chauffeurs must be licensed.*

"(a) It shall be unlawful for any person to drive a motor vehicle upon any public highway in this state, whether as an operator or a chauffeur, unless such person has been licensed as an operator or chauffeur; except such persons as are expressly exempted under this act." [Exceptior not applicable here.]

"Sec. 64. *What persons shall not be licensed as operators or chauffeurs.*

"(a) An operator's license shall not be issued to any person under the age of sixteen years and no chauffeur's license shall be issued to any person under the age of eighteen years, provided that an operator's license may be issued to any minor over the age of fourteen years and less than sixteen years of age upon special application and statement of reasons by the parent or guardian of such minor."

Especially pertinent findings by the trial court follow:

"III. The court finds that on or about the 16th day of June, 1934, and while said policy was in full force and effect, one Helen B. Anthony operated the Chevrolet automobile referred to in and covered by the said policy of insurance with the permission and consent of the assured, R. O. Anthony, and operated the same negligently so as proximately to cause an accident and injury to the person and property of the plaintiff to his damage in the reasonable sum of Five Thousand Ninety-two and 55/100 Dollars ($5092.55)."

"IX. The court finds that it is true that the defendant, prior to the trial of the action in the state court entered into the non-waiver agreement received in evdience in this action with the assured, R. O. Anthony, and with Helen B. Anthony. That the said non-waiver agreement was executed just prior to the commencement of the trial of the state court action. That the plaintiff was not a party to that agreement and had no knowledge of any facts referred to therein and was not in privity with any of the defendants in the state court action and that so far as the conduct of the defendant affects the plaintiff in this action, the defendant managed and conducted the defense in the state court."

"XII. With regard to the second separate defense of defendant, the court finds that the said automobile at the time of the impact

that resulted in the injury to the plaintiff was being jointly operated by Helen B. Anthony and Nancy Leidendeker; that said Helen B. Anthony was a member of the assured's immediate family and was an adult person over the age of twenty-one (21) years who was licensed by the State of California to drive an automobile; and that said Nancy Leidendeker was a minor and not permitted under the applicable laws to operate a motor vehicle in the State of California; that the assured had forbidden said minor Nancy Leidendeker to drive any motor vehicle or automobile of which he was the owner or which he controlled; and that the action of said Nancy Leidendeker on the day of the accident and at the time of the impact involved in this action were in disobedience of and contrary to the commands, orders and instructions of the assured, R. O. Anthony; that at the time of the accident, insofar as the propulsion of the vehicle was concerned, other than the means of direction, all instrumentalities of said automobile were being physically actuated by said minor Nancy Leidendeker, with the acquiescence and knowledge of Helen B. Anthony and without any knowledge, acquiescence or consent on the part of the assured, R. O. Anthony; that the proximate and direct cause of the collision between the insured automobile and a truck owned by San Pedro Commercial Company was the act of Helen B. Anthony in seizing the steering wheel of the automobile at and immediately preceding the moment of impact and collision."

"XVI. That prior to the commencement of the trial of the said State court action the defendant had full knowledge of all the facts and circumstances concerning the presence of the said Nancy Leidendeker in the driver's seat or in a part of said seat, and all other facts relied on by the defendant as constituting a concealment and a defense of the case at bar, but that the defendant did not reveal said facts to the plaintiff or his counsel, and that plaintiff and his counsel had no knowledge that the said Nancy Leidendeker occupied any part of the driver's seat until said trial was completed."

"XVII. The court finds that prior to the collision between the insured automobile and a truck owned by the San Pedro Commercial Company, Helen B. Anthony seized the steering wheel of the insured automobile and steered the same to the right, proximately causing the same to come into collision with the said truck and proximately causing the same to turn to its right, proximately causing the collision of plaintiff's car and the injuries and damages suffered by him."

When read together no material conflict exists between findings III and XII; there is no real difficulty in understanding the circumstances to which they are addressed. The first contains statements concerning the conduct of one in authority; the second de-

scribes in detail what really took place at the moment of collision. The word "operate" has varying meanings according to the context. Webster's New International Dictionary. One may operate singly with his own hands, or jointly with another, or through one or more agents.

From the findings it appears that when the accident occurred the automobile was not being operated by the assured, his paid driver, a member of his immediate family or a person acting under his direction, within fair intendment of the policy. Contrary to the owner's commands "insofar as the propulsion of the vehicle was concerned, other than the means of direction, all instrumentalities of said automobile were being physically actuated by said minor" who was inhibited by the statutes from driving or operating a motor vehicle within the State.

Just before the accident, Mrs. Anthony seized the steering wheel and by negligent manipulation of this caused the collision.

If, as found, the automobile was being jointly operated by the wife and the girl the risk was not within the policy. The latter was forbidden by law to operate or drive jointly or singly. If the wife was in control the statute forbade her to permit driving by the girl. In any view, when the collision occurred the car was being driven or operated in violation of the statutes.

In support of his position respondent relies heavily upon *O'Connell* v. *N. J. Fed. Ins. Co.*, 201 App. Div. (N. Y.) 117; and *Williams* v. *Nelson*, 228 Mass. 191. These causes, we think, are not in point. They were decided upon facts and circumstances materially different from those here disclosed.

Respondent further submits that petitioner is precluded from any inquiry concerning who actually was driving the car when the accident occurred. He says the entire sequence of events surrounding Nancy Leidendeker was highly material and should have been litigated in the original tort action brought by Coughran against the Anthonys, and based solely upon permissive use. Also, if the facts then known by petitioner had been there revealed, it would have become apparent that the girl lacked permission to drive and that the wife exceeded the terms of her authorization; and that by suppressing these facts petitioner exposed the assured to a liability which otherwise might not have been imposed.

The judgment roll of the tort action is not before us; we are limited to the findings. That action was defended by the peti-

tioner under a non-waiver agreement; the complaint alleged damages from negligence of the wife as driver and operator imputed to the husband. Defenses now presented by the Insurance Company against liability under the policy were not involved. Joint driving by Mrs. Anthony and the girl was not subject to inquiry.

Moreover, in the circumstances we may not conclude that respondent should prevail because petitioner failed to present facts in the tort action which he says if then presented might have defeated the very judgment upon which he now relies to support his claim.

The judgment of the Circuit Court of Appeals must be reversed. The cause will be remanded to the District Court with instructions to enter judgment for the Insurance Company, petitioner here.

Reversed and Remanded.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.